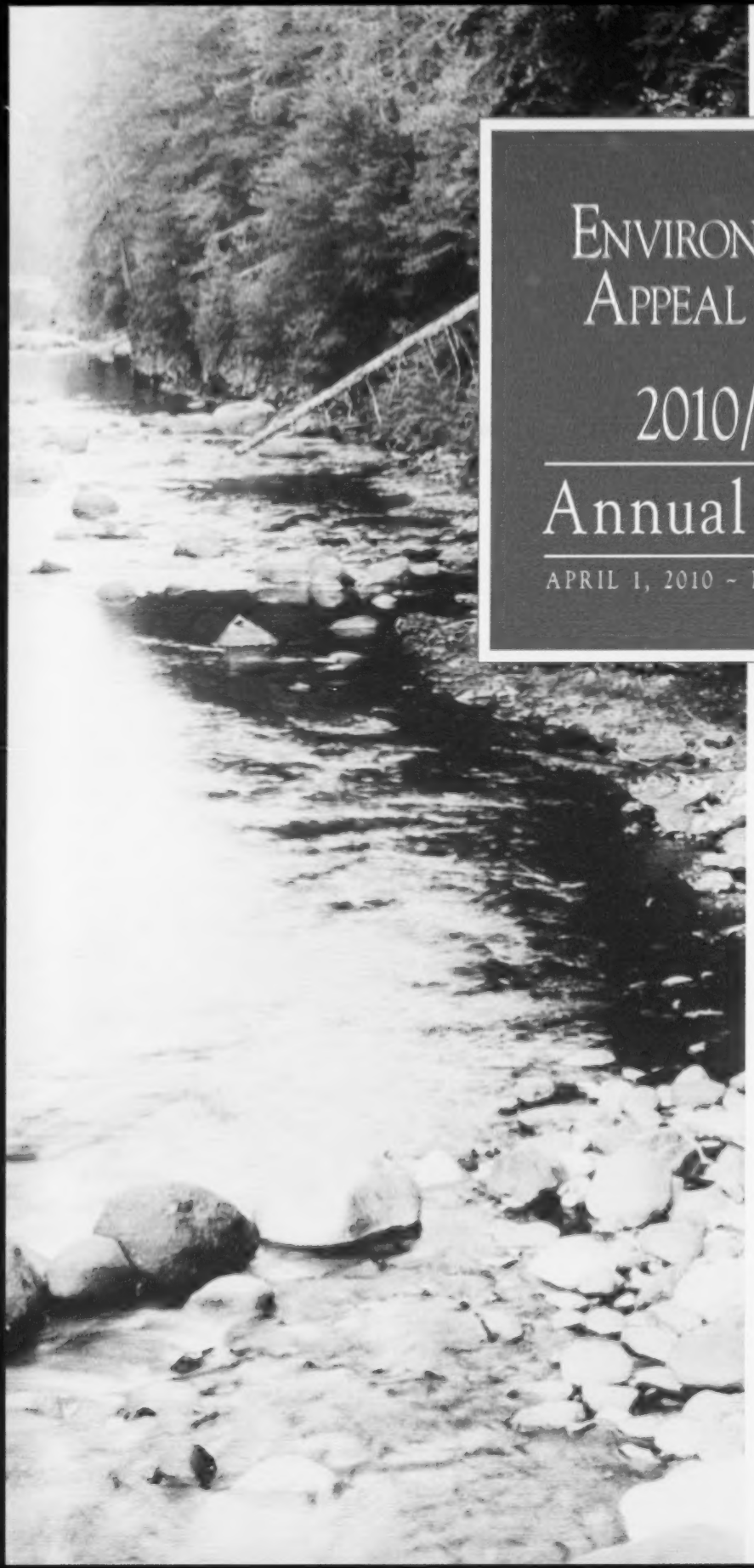

Environmental Appeal Board

2010/2011

Annual Report

APRIL 1, 2010 ~ MARCH 31, 2011

BRITISH COLUMBIA

Environmental Appeal Board

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Minister of Environment
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Honourable Steve Thomson
Minister of Forests, Lands and Natural Resource Operations
Parliament Buildings
Victoria, British Columbia
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Dear Ministers:

I respectfully submit herewith the Annual Report of the Environmental Appeal Board for the period April 1, 2010 through March 31, 2011.

Yours truly,

Alan Andison
Chair
Environmental Appeal Board

AR 10/11

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Message from the Chair

I am pleased to submit the Annual Report of the Environmental Appeal Board for the 2010/2011 fiscal year.

The Year in Review – Appeals

During the past year the Board has continued to work towards reducing the number of appeals that proceed to a hearing. During this report period, I am pleased to note that while 49 new appeals were filed, 34 appeals were withdrawn or resolved during that same period. Consequently over 70% of the open appeals during the report period did not require a hearing. Only 18 appeals during this period went to a hearing, and of those, only 11 were the subject of an oral hearing.

Of the appeals that were not resolved and required a hearing, the issues to be addressed by the Board related to serious concerns with, and potential impacts to, human health, the environment and the economy of British Columbia. The subject matter of these appeals included landfills, air emissions from commercial greenhouses, the remediation of contaminated sites, aerial spraying of pesticides, hunting quotas for guide outfitters, and micro-hydro power projects. A selection of these and other Board decisions have been summarized in this report.

Reducing Costs to Government – New Additions to the Board's Office

During this report year, the Board's general office took over the administration of two tribunals: the Oil and Gas Appeal Tribunal and the Financial Services Tribunal. The Financial Services Tribunal was established in 2004 and had been previously administered by employees within the Ministry of Finance. The Oil and Gas Appeal Tribunal is a new tribunal established in October of 2010 when section 19 of the *Oil and Gas Activities Act* came into force. This tribunal is more directly linked to the Board, as the Chair of the Board is also the Chair of the Oil and Gas Appeal Tribunal, and all members of the Board have been cross-appointed to the new tribunal.

The addition of these tribunals to this office is a testament to the success of this shared services model. Having one office providing administrative support for a number of appellate tribunals gives each tribunal greater access to resources while, at the same time, reducing administrative and operating costs and allowing the tribunals to operate independently of one another.

The Board office now administers eight tribunals:

- Environmental Appeal Board
- Forest Appeals Commission
- Oil and Gas Appeal Tribunal

- Community Care and Assisted Living Appeal Board
- Health Professions Review Board
- Hospital Appeal Board
- Financial Services Tribunal
- Industry Training Appeal Board

Board Membership

The Board's membership experienced several significant changes to its roster of qualified professionals during the past year. A number of valued members left the Board during this reporting period. I wish to thank those departing members for their exceptional contribution to the activities of the Board over the past number of years. Those members are Margaret Eriksson, David Ormerod and Phillip Wong. I wish each of these individuals well in their future endeavours.

I am also very pleased to welcome three new members to the Board who will complement the expertise and experience of the outstanding professionals on the Board. These new members are R. O'Brian Blackall, Tony Fogarassy and Douglas VanDine.

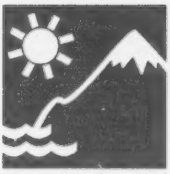
I am very fortunate to have a Board that is comprised of highly qualified individuals who can deal with the various subjects that are heard by the Board. The current membership includes professional biologists, agrologists, engineers, foresters, and lawyers with expertise in the areas of natural resources and administrative law. These people bring with them the necessary expertise to hear cases involving issues ranging from contaminated sites to hunter licensing.

I would like to take this opportunity to thank all of the existing Board members, as well as the Board staff, for their hard work and dedication over the past year and for their continuing commitment to the work of the Board.

Alan Andison

IN MEMORIAM

Sadly, on December 26, 2010, Margaret Eriksson passed away after a courageous five-year battle with cancer. Margaret contributed many years of service to both the Forest Appeals Commission and the Board, and she continued to hear appeals and write decisions even as she fought cancer. The Board's members and staff will remember and miss Margaret's thoughtful and principled approach to her work.



Introduction

The Environmental Appeal Board hears appeals from administrative decisions related to environmental issues. The information contained in this report covers the period from April 1, 2010 to March 31, 2011.

The report provides an overview of the structure and function of the Board and how the appeal process operates. It contains statistics on appeals filed, hearings held and decisions issued by the Board within the report period. It also contains the Board's recommendations for legislative changes to the statutes and regulations under which the Board has jurisdiction to hear appeals. Finally, a selection of summaries of the decisions issued by the Board during the report period is provided, and sections of the relevant statutes and regulations are reproduced.

Decisions of the Environmental Appeal Board are available for viewing at the Board office, on the Board's website, and at the following libraries:

- Ministry of Environment Library
- University of British Columbia Law Library
- University of Victoria Law Library
- British Columbia Courthouse Library Society
- West Coast Environmental Law Library

Decisions are also available through the Quicklaw Database.

Detailed information on the Board's policies and procedures can be found in the Environmental Appeal Board Procedure Manual, which may be obtained from the Board office or viewed on the Board's website. If you have any questions or would like additional copies of this report, please contact the Board office. The Board can be reached at:

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The Board

The Environmental Appeal Board is an independent, quasi-judicial tribunal established on January 1, 1982, under the *Environment Management Act*, and continued under section 93 of the *Environmental Management Act*. As an adjudicative body, the Board operates at arms-length from government to maintain the necessary degree of independence and impartiality. This is important because it hears appeals from administrative decisions made by government officials under a number of statutes.

For the most part, decisions that can be appealed to the Board are made by provincial and municipal government officials under the following six statutes, the relevant provisions of which are administered by the Minister identified: the *Environmental Management Act* and the *Greenhouse Gas Reduction (Cap and Trade) Act*, administered by the Minister of Environment; the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act* administered by the Minister of Energy; and the *Integrated Pest Management Act*, the *Wildlife Act* and the *Water Act*, administered by the Minister of Forests, Lands and Natural Resource Operations. The legislation establishing the Board is administered by the Minister of Justice and Attorney General of BC.

The Board makes decisions regarding the legal rights and responsibilities of parties that appear before it and decides whether the decision under appeal was made in accordance with the law. Like a court, the Board must decide its appeals by weighing the evidence before it, making findings of fact, interpreting the legislation and the common law and applying the law and legislation to the facts.

In carrying out its functions, the Board has the powers granted to it under the above-mentioned statutes, as well as additional powers provided under the *Administrative Tribunals Act*, including the ability to compel persons or evidence to be brought before the Board. The Board also ensures that its processes comply with the common law principles of natural justice.

Appointments to the Board and the administration of the Board are governed by the *Administrative Tribunals Appointment and Administration Act*.

Board Membership

Board members are appointed by the Lieutenant Governor in Council (Cabinet) under section 93(3) of the *Environmental Management Act*. The members appointed to the Board are highly qualified individuals, including professional biologists, professional foresters, professional engineers and lawyers with expertise in the areas of natural resources and administrative law. These members apply their respective technical expertise and adjudication skills to hear and decide appeals in a fair, impartial and efficient manner.

The members are drawn from across the Province. Board membership consists of a full-time chair, one or more part-time vice-chairs, and a number of part-time members. The length of the initial appointments and any reappointments of Board members, including the chair, are set out in the *Administrative Tribunals Appointment and Administration Act*, as are other matters relating to the appointments. This Act also sets out the responsibilities of the chair.

The Board members during this reporting period were as follows:

The Board	Profession	From
Chair		
Alan Andison	Lawyer	Victoria
Vice-chair		
Robert Wickett	Lawyer	Vancouver
Members		
R. O'Brian Blackall (from October 7, 2010)	Land Surveyor	Charlie Lake
Carol Brown	Lawyer/CGA/Mediator	Prince George
Robert Cameron	Professional Engineer	North Vancouver
Monica Danon-Schaffer	Professional Engineer	West Vancouver
Tony Fogarassy (from October 7, 2010)	Geoscientist/Lawyer	Vancouver
Margaret Eriksson (until October 31, 2010)	Lawyer	Vancouver
Les Gyug	Professional Biologist	Westbank
James Hackett	Professional Forester	Nanaimo
R.G. (Bob) Holtby	Professional Agrologist	Westbank
Gabriella Lang	Lawyer	Campbell River
Blair Lockhart	Lawyer/Geoscientist	Vancouver
Ken Long	Professional Agrologist	Prince George
David Ormerod (until October 31, 2010)	Professional Forester	Victoria
David Searle, CM, QC	Lawyer (Retired)	North Saanich
Douglas VanDine (from October 7, 2010)	Professional Engineer	Victoria
Reid White	Prof. Engineer/Prof. Biologist (Retired)	Telkwa
Loreen Williams	Lawyer/Mediator	West Vancouver
Phillip Wong (until October 31, 2010)	Professional Engineer	Vancouver

Administrative Law

Administrative law is the law that governs public officials and tribunals that make decisions affecting the rights and interests of people. It applies to the decisions and actions of statutory decision-makers who exercise power derived from legislation. This law has developed to ensure that officials make their decisions in accordance with the principles of procedural fairness/natural justice by following proper procedures and acting within their jurisdiction.

The Board is governed by the principles of administrative law and, as such, must treat all parties involved in a hearing before the Board fairly, giving each party a chance to explain its position.

Appeals to the Board are decided on a case-by-case basis. Unlike a court, the Board is not bound by its previous decisions; present cases of the Board do not necessarily have to be decided in the same way that previous ones were.

The Board Office

The office provides registry services, legal advice, research support, systems support, financial and administrative services, training and communications support for the Board.

The Board shares its staff and its office space with the Forest Appeals Commission, the Oil and Gas Appeal Tribunal, the Community Care and Assisted Living Appeal Board, the Financial Services Tribunal, the Hospital Appeal Board, the Industry Training Appeal Board and the Health Professions Review Board.

Each of these tribunals operates completely independently of one another. Supporting eight tribunals through one administrative office gives each tribunal greater access to resources while, at the same time, reducing administration and operation costs. In this way, expertise can be shared and work can be done more efficiently.

Policy on Freedom of Information and Protection of Privacy

The appeal process is public in nature. Hearings are open to the public, and information provided to the Board by one party must also be provided to all other parties to the appeal.

The Board is subject to the *Freedom of Information and Protection of Privacy Act* and the regulations under that Act. If a member of the public requests information regarding an appeal, that information may be disclosed, unless the information falls under one of the exceptions in the *Freedom of Information and Protection of Privacy Act*.

Parties to appeals should be aware that information supplied to the Board is subject to public scrutiny and review.

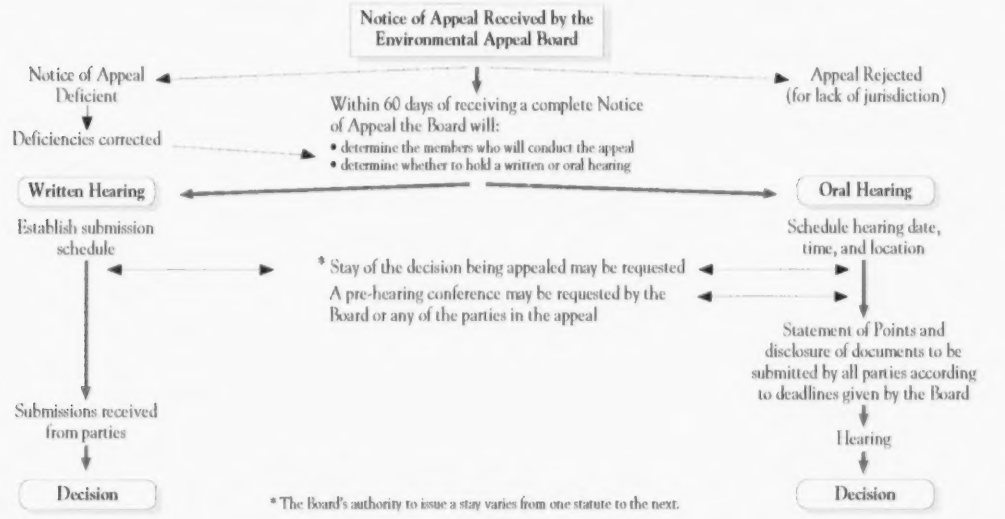
In addition, the names of the parties in an appeal appear in the Board's published decisions which are posted on the Board's website, and may appear in this Annual Report.

The Appeal Process

Part 8, Division 1 of the *Environmental Management Act* sets out the basic structure, powers and procedures of the Board. It describes the composition of the Board and how hearing panels may be organized. It also describes the authority of the Board to add parties to an appeal, the rights of the parties to present evidence, and the Board's power to award costs. Additional procedural details, such as the requirements for starting an appeal, are provided in the *Environmental Appeal Board Procedure Regulation*, B.C. Reg. 1/82. The relevant portions of the *Act* and the *Regulation* are included at the back of this report.

In addition to the procedures contained in the *Act* and the *Regulation*, the Board has developed its own policies and procedures. These policies and procedures have been created in response to issues that arise during the appeal process, from receipt of a notice of appeal, to the hearing, to the issuance of a final decision on the merits. To ensure that the appeal process is open and understandable to the public, these policies and procedures have been set out in the Environmental Appeal Board Procedure Manual which is posted on the Board's website.

Finally, in order to determine what decisions are appealable to the Board, who can appeal the decisions, the time for filing an appeal, whether the Board can issue a stay of the decision under appeal, and what the Board's decision-making powers are with respect to the appeal, one must consult the individual statutes and regulations which provide the right of appeal to the Board. A summary of the appeal provisions in the individual statutes is provided below.


Notice of Appeal Received by the Environmental Appeal Board
Notice of Appeal Deficient
Deficiencies corrected
Appeal Rejected (for lack of jurisdiction)
Within 60 days of receiving a complete Notice of Appeal the Board will:
• determine the members who will conduct the appeal
• determine whether to hold a written or oral hearing
Written Hearing
Oral Hearing
Establish submission schedule
Schedule hearing date, time, and location
* Stay of the decision being appealed may be requested
A pre-hearing conference may be requested by the Board or any of the parties in the appeal
Statement of Points and disclosure of documents to be submitted by all parties according to deadlines given by the Board
Submissions received from parties
Hearing
Decision
Decision
* The Board's authority to issue a stay varies from one statute to the next.

Appeals under the *Environmental Management Act*

The *Environmental Management Act* regulates the discharge of waste into the environment and the clean-up of contaminated sites in B.C., by setting standards and requirements, and empowering government officials to issue permits, approvals, operational certificates, and orders, and impose administrative penalties for non-compliance. Waste regulated by this Act includes air contaminants, litter, effluent, refuse, biomedical waste, and special wastes.

The decisions that may be appealed under the *Environmental Management Act* are set out in Division 2. That division states that a person "aggrieved by a decision" of a director or a district director may appeal that decision to the Board. An appealable "decision" is defined as follows:

(a) making an order,

(b) imposing a requirement,

(c) exercising a power except a power of delegation,

(d) issuing, amending, renewing, suspending, refusing, cancelling or refusing to amend a permit, approval or operational certificate,

(e) including a requirement or a condition in an order, permit, approval or operational certificate,

(f) determining to impose an administrative penalty, and

(g) determining that the terms and conditions of an agreement under section 115(4) have not been performed [under section 115(4), a director may enter into an agreement with a person who is liable for an administrative penalty. The agreement may provide for the reduction or cancellation of the penalty, subject to the terms and conditions the director considers necessary or desirable.].

The time limit for filing an appeal of a decision is 30 days after notice of the decision is given.

The Board can order a stay of the decision under appeal.

Appeals under the *Greenhouse Gas Reduction (Cap and Trade) Act*

The *Greenhouse Gas Reduction (Cap and Trade) Act* requires operators of B.C. facilities emitting 10,000 tonnes or more of carbon dioxide equivalent emissions per year to report their greenhouse gas emissions to the government, and empowers government officials to impose administrative penalties for non-compliance.

Under the *Greenhouse Gas Reduction (Cap and Trade) Act*, certain decisions of a director, as designated by the responsible minister, may be appealed by a person who is served with an appealable decision. The decisions that may be appealed are:

- the determination of non-compliance under section 18 of the Act *[imposed administrative penalties: failure to retire compliance units]* or of the extent of that non-compliance, as set out in an administrative penalty notice;*
- the determination of non-compliance under section 19 of the Act *[administrative penalties in relation to other matters]*, of the extent of that non-compliance or of the amount of the administrative penalty, as set out in an administrative penalty notice;

- a decision under section 13(7) of the *Reporting Regulation [approval of alternative methodology for 2010]*; and
- a decision under section 14(2) of the *Reporting Regulation [approval of change of methodology]*.

According to the *Reporting Regulation*, B.C. Reg. 272/2009, the time limit for filing an appeal of a decision is 30 days after notice of the decision is given, and the Board may order a stay of the decision under appeal.

*Sections 18 and 19 of the Act are not yet in force.

Appeals under the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*

The *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act* requires suppliers of fuels used for transportation to supply a prescribed percentage of renewable fuels and to submit annual compliance reports to the government, and empowers government officials to impose administrative penalties for non-compliance.

Under the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*, certain decisions of a director, as designated by the responsible minister, may be appealed by a person who is served with an appealable decision. The decisions that may be appealed are:

- the determination of non-compliance under section 11 of the *Act [imposed administrative penalties: fuel requirements]* or of the extent of that non-compliance, as set out in an administrative penalty notice;
- the determination of non-compliance under section 12 of the *Act [administrative penalties in relation to other matters]*, of the extent of that non-compliance or of the amount of the administrative penalty, as set out in an administrative penalty notice;
- a refusal to accept an alternative calculation of carbon intensity under section 6 (3)(b)(iii) of the *Act [requirements for reduced carbon intensity]*;
- a prescribed decision or a decision in a prescribed class.

According to the *Renewable and Low Carbon Fuel Requirements Regulation*, B.C. Reg. 394/2008, the time limit for commencing an appeal is 30 days after the decision is served. The Board is not empowered to order a stay of the decision under appeal.

Appeals under the *Integrated Pest Management Act*

The *Integrated Pest Management Act* regulates the sale, transportation, storage, preparation, mixing, application and disposal of pesticides in B.C. This Act requires permits to be obtained for certain pesticide uses, and requires certain pesticide applicators to be certified. It also prohibits the use of pesticides in a way that would cause an unreasonable adverse effect, and it empowers government officials to impose administrative penalties for non-compliance.

Under this Act, the right of appeal (those with standing to appeal) is quite broad. The Act states that "a person" may appeal a decision under this Act to the appeal board. "Decision" is then defined as:

> (a) making an order, other than an order under section 8 [an order issued by the Minister of Environment];

(b) specifying terms and conditions, except terms and conditions prescribed by the administrator, in a licence, certificate or permit;

(c) amending or refusing to issue, amend or renew a licence, certificate or permit;

(d) revoking or suspending a licence, certificate, permit or confirmation;

(e) restricting the eligibility of a holder of a licence, certificate, permit or pest management plan to apply for another licence, certificate or permit or to receive confirmation;

(f) determining to impose an administrative penalty;

(g) determining that the terms and conditions of an agreement under section 23(4) have not been performed [under section 23(4), the administrator may enter into an agreement with a person who is liable for an administrative penalty. The agreement may provide for the reduction or cancellation of the penalty, subject to the terms and conditions the administrator considers necessary or desirable].

The time limit for filing an appeal of a decision is 30 days after the date the decision being appealed is made.

The Board can order a stay of the decision under appeal.

Appeals under the *Water Act*

The *Water Act* regulates the diversion, use and allocation of surface water, regulates work in and about streams, regulates the construction and operation of ground water wells, and empowers government officials to issue licences, approvals, and orders.

The decisions that may be appealed under the *Water Act*, and the people who may appeal them, are set out in section 92(1) of the *Act*. The *Act* states that an order of the comptroller, the regional water manager or an engineer may be appealed to the appeal board by the person who is subject to the order, an owner whose land is or is likely to be physically affected by the order, or a licensee, riparian owner or applicant for a licence who considers that their rights are or will be prejudiced by the order.

In addition, an order of the comptroller, the regional water manager or an engineer made under Part 5 [Wells and Ground Water Protection] or 6 [General] of the *Act* in relation to a well, works related to a well, ground water or an aquifer may be appealed to the Board by the person who is subject to the order, the well owner, or the owner of the land on which the well is located.

Finally, an order of the comptroller, the regional water manager or an engineer made in relation to a well drilling authorization under section 81 of the *Act* may be appealed to the appeal board by the person who is subject to the order, the well owner, the owner of the land on which the well is located, or a person in a class prescribed in respect of the water management plan or drinking water protection plan for the applicable area.

It should be noted that a licensee cannot appeal an order of the comptroller or a regional water manager to cancel a licence if the cancellation was because the licensee failed to pay the rentals due to

the government for three years, or if the licence was cancelled on the grounds of failure to pay the water bailiff's fees for six months.

The time limit for filing an appeal is 30 days after notice of the decision is given.

The Board can order a stay of the decision under appeal.

Appeals under the *Wildlife Act*

The *Wildlife Act* regulates the use, allocation, ownership, import and export of fish and wildlife in B.C., and empowers government officials to issue licences, permits, certificates, and orders, and impose administrative penalties for non-compliance. Activities regulated by this Act include hunting, angling in non-tidal waters, guide outfitting, and trapping.

Under section 101.1 of the *Wildlife Act*, a decision of a regional manager or the director that affects a licence, permit, registration of a trapline or guiding territory certificate, or an application for any of those things, may be appealed by the person who is affected by the decision.

The time limit for filing an appeal under the *Wildlife Act* is 30 days after notice is given.

The Board can order a stay of the decision under appeal.

Commencing an Appeal

Notice of Appeal

For all appeals, an appellant must prepare a notice of appeal and deliver it to the Board office within the time limit specified in the relevant statute. The notice of appeal must comply with the content requirements of the *Environmental Appeal Board Procedure Regulation*. It must contain the name and address of the appellant, the name of the appellant's counsel or agent (if any), the address for service upon the appellant, grounds for appeal, particulars relative to the appeal and a statement of the nature of the order requested. Also, the notice of appeal must be signed by the appellant, or on his or her behalf by their counsel or agent, and the notice must be accompanied by a fee of $25 for each action, decision or order appealed.

In addition, the Board requires a copy of the permit, licence, order or decision being appealed.

Generally, if the Board does not receive a notice of appeal within the specified time limit, the appellant will lose the right to appeal.

If the notice of appeal is missing any of the required information, the Board will notify the appellant of the deficiencies. The Board may refrain from taking any action on an appeal until the notice is complete and any deficiencies are corrected.

Once a notice of appeal is accepted as complete, the Board will notify the office of the official who made the decision being appealed. The decision-maker will be the respondent in the appeal.

Third Party Status

The Board has the power to add parties to an appeal. As a standard practice, the Board will offer party status to a person who may be affected by the appeal such as the person holding the permit or licence which is the subject of an appeal by another person. In addition, a person may apply to the Board to become a party to the appeal if he or she may be affected by the Board's decision.

When deciding whether to add a party to the appeal, the Board will consider a variety of factors such as the timeliness of the application, the potential impact of the Board's decision on the person, whether the person can bring a new perspective to the appeal and/or make a valuable contribution, whether the potential benefits of this person's contribution

outweighs any prejudice to the other parties, including any undue delay or lengthening of proceedings, and any other factors that are relevant in the circumstances.

These additional parties are referred to as "third parties" to the appeal. They have all of the same rights as the appellant and respondent to present evidence, cross examine the witnesses of the other parties, and make opening and closing arguments.

Participants

The Board also has the discretion to invite any person to be heard in the appeal, without making that person a party to the appeal. This may be done on the Board's initiative or as a result of a request. The Board refers to these people as "participants".

If the Board receives an application from a person wishing to participate in an appeal, the Board will generally consider the same factors described above in relation to adding parties. The Board will then decide whether the person should be granted participant status and, if so, the extent of that participation. In all cases, a participant may only participate in a hearing to the extent that the Board allows. It does not have the rights of a party.

Stays Pending Appeal

With the exception of decisions made under the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*, the Board is granted the power to stay a decision or an order pending an appeal.

A stay has the effect of postponing the legal obligation to implement all or part of the decision or order under appeal until the Board has held a hearing, and issued its decision on the appeal.

Type of Hearing

The Board has the authority to conduct a new hearing on a matter before it. This means that the Board may hear the same evidence that was before the original decision-maker, as well as receive new evidence.

An appeal may be conducted by way of written submissions, oral hearing or a combination of both. In some cases, the Board will conduct an oral hearing. However, in other instances the Board may find it appropriate to conduct a hearing by way of written submissions.

The *Environmental Appeal Board Procedure Regulation* requires the chair to determine, within 60 days of receiving a complete notice of appeal, which member(s) of the Board will hear the appeal and the type of appeal hearing.

Prior to ordering that a hearing be conducted by way of written submissions, the Board may request the parties' input.

Written Hearing Procedure

If it is determined that a hearing will be by way of written submissions, the Board will invite all parties to provide submissions. The appellant will provide its submissions, including its evidence, first. The other parties will have an opportunity to respond to the appellant's submissions when making their own submissions, and to present their own evidence.

The appellant is then given an opportunity to comment on the submissions and evidence provided by the other parties.

Oral Hearing Procedure

As noted above, the *Environmental Appeal Board Procedure Regulation* requires the chair to determine, within 60 days of receiving a complete notice of appeal, which member(s) of the Board will hear the appeal and the type of appeal hearing.

When the chair decides that an appeal will be conducted by a full oral hearing, the chair is required to set the date, time and location of the

hearing and notify the parties, the applicant (if different from the appellant) and any objectors (as defined in the *Environmental Appeal Board Procedure Regulation*). If any of the parties to the appeal cannot attend the hearing on the date scheduled, a request may be made to the Board to change the date.

An oral hearing may be held in the locale closest to the affected parties, at the Board office in Victoria or anywhere in the province. The Board will decide where the hearing will take place on a case-by-case basis.

Once a hearing is scheduled, the parties will be asked to provide a Statement of Points to the Board.

Statement of Points and Document Disclosure

To help identify the main issues to be addressed in an oral hearing, and the arguments that will be presented in support of those issues, all parties to the appeal are asked to provide the Board, and each of the parties to the appeal, with a written Statement of Points and all relevant documents.

Dispute Resolution

The Board encourages parties to resolve the issues underlying the appeal at any time in the appeal process. The Board's procedures for assisting in dispute resolution are as follows:

- early screening of appeals to determine whether the appeal may be resolved without a hearing;
- pre-hearing conferences; and
- mediation, upon consent of all parties.

These procedures give the parties an opportunity to resolve the issues underlying the appeal and avoid the need for a formal hearing. If the parties reach a mutually acceptable agreement, the parties may set out the terms and conditions of their settlement in a consent order which is submitted to the Board for its approval. Alternatively, the appellant may withdraw his or her appeal at any time.

Pre-hearing Conference

Either before or after the Statements of Points and relevant documents have been exchanged, the Board, or any of the parties, may request a pre-hearing conference.

Pre-hearing conferences provide an opportunity for the parties to discuss any procedural issues or problems, to resolve the issues between the parties, and to deal with any preliminary concerns.

A pre-hearing conference will normally involve the spokespersons for the parties, one Board member and one staff member from the Board office. It will be less formal than a hearing and will usually follow an agenda, which is set by the parties. The parties are given an opportunity to resolve the issues themselves, giving them more control over the process.

If all of the issues in the appeal are resolved, there will be no need for a full hearing. Conversely, it may be that nothing will be agreed upon, or some issues still remain, and the appeal will proceed to a hearing.

Disclosure of Expert Evidence

An expert witness is a person who, through experience, training and/or education, is qualified to give an opinion on certain aspects of the subject matter of the appeal. To be an "expert" the person must have knowledge that goes beyond "common knowledge".

The Board is not bound by the provisions relating to expert evidence in the British Columbia *Evidence Act*. However, the Board does require that 60 days advance notice that expert evidence will be given at a hearing and that the notice include a brief statement of the expert's qualifications and areas of expertise, the opinion to be given at the hearing, and the facts on which the opinion is based.

Obtaining an Order for Attendance of a Witness or Production of Documents

If a proposed witness refuses to attend a hearing voluntarily or refuses to testify, a party may ask the Board to make an order requiring the person to attend a hearing and give evidence. Also, if a person refuses to produce particular relevant documents in their possession, a party may ask the Board to order the person to produce a document or other thing prior to, or during, a hearing.

Section 93(11) of the *Environmental Management Act* and subsection 34(3) of the *Administrative Tribunals Act* provide the Board with the power to require the attendance of a witness at a hearing, and to compel a witness to produce for the tribunal, or a party to the appeal, a document or other thing in the person's possession or control that is admissible and relevant to an issue in the appeal.

The Hearing

A hearing is a more formal process than a pre-hearing conference, and allows the Board to receive the evidence it uses to make a decision.

In an oral hearing, each party will have the opportunity to present evidence, call witnesses and explain its case to the Board.

Although hearings before the Board are less formal than those before a court, some of the hearing procedures are similar to those of a court: witnesses give evidence under oath or affirmation and witnesses are subject to cross-examination.

Parties to the appeal may have lawyers representing them at the hearing, but this is not required. The Board will make every effort to keep the process open and accessible to parties not represented by a lawyer.

All hearings before the Board are open to the public.

Rules of Evidence

The rules of evidence used in a hearing are less formal than those used in a court. The Board has full discretion to receive any information that it considers relevant and will then determine what weight to give the evidence.

The Decision

In making its decision, the Board is required to determine, on a balance of probabilities, what occurred and to decide the issues raised in the appeal.

The Board will not normally make a decision at the end of the hearing. Instead, in the case of both an oral and a written hearing, the final decision will be given in writing within a reasonable time following the hearing. Copies of the decision will be given to the parties, the participants, and the appropriate minister(s).

There is no right of appeal to the courts from a Board decision. Section 97 of the *Environmental Management Act* allows Cabinet to vary or rescind an order or decision of the Board if it is in the public interest to do so.

Alternatively, a party dissatisfied with a decision or order of the Board may apply to the British Columbia Supreme Court for judicial review of the decision pursuant to the *Judicial Review Procedure Act*.

Costs

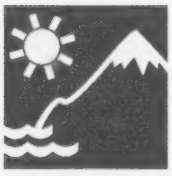
The Board also has the power to award costs. In particular, it may order a party to pay all or part of the costs of another party in connection with the appeal. The Board's policy is to only award costs in special circumstances.

In addition, if the Board considers that the conduct of a party has been frivolous, vexatious or abusive, it may order that party to pay all or part of the expenses of the Board in connection with the appeal.

Legislative Amendments Affecting the Board

During this report period, there were no legislative changes that affected the types of appeals the Board hears, or that affected the Board's powers or procedures.

However, as part of the government reorganization that occurred on October 25, 2010, the Attorney General (Minister of Justice) was given the statutory authority under the *Constitution Act* as the Minister responsible for the activities of the Board, as well as two of the other tribunals administered by the Board's office, the Forest Appeals Commission and the Oil and Gas Appeal Tribunal.



Recommendations

There were no issues that arose in 2010/2011 that warrant a recommendation at this time.

Statistics

The following tables provide information on the appeals filed with the Board and decisions published by the Board during the report period. The Board publishes all of its decisions on the merits of an appeal, and most of the important preliminary and post-hearing decisions. The Board also issues hundreds of unpublished decisions on a variety of preliminary matters that are not included in the statistics below.

Between April 1, 2010 and March 31, 2011, a total of 49 appeals were filed with the Board against 48 administrative decisions, and a total of 58 decisions were published. No appeals were filed or heard under the *Greenhouse Gas Reduction (Cap and Trade) Act* or the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*.

April 1, 2010 – March 31, 2011

Total appeals filed		**49**
Total appeals closed		**86**
Appeals abandoned or withdrawn		**32**
Appeals rejected, jurisdiction/standing		**6**
Hearings held on the merits of appeals		
Oral hearings completed	11	
Written hearings completed	7	
***Total hearings held on the merits of appeals**		**18**
Total oral hearing days		**37**
Published Decisions issued		
Final Decisions		
Appeals allowed	4	
Appeals allowed, allowed in part	1	
Appeals dismissed	39	
Total Final Decisions		**44**
Decisions on preliminary matters		**8**
Decisions on Costs		**4**
Consent Orders		**2**
Total published decisions issued		**58**

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This table provides an overview of the total appeals filed, hearings held, and published decisions issued by the Board during the report period. It should be noted that the number of decisions issued and hearings held during the report period does not necessarily reflect the number of appeals filed for the same period, because the appeals filed in previous years may have been heard or decided during the report period.

It should also be noted that two or more appeals may be heard together.

Note:

* Most preliminary applications and post-hearing applications are conducted in writing. However, only the final hearings on the merits of the appeal have been included in this statistic.

Appeal Statistics by Act

	Environmental Management	Integrated Pest Management	Waste Management	Water	Wildlife	Total
Appeals filed during report period	5			20	24	49
Appeals closed during report period	10	1	6	29	40	86
Appeals abandoned or withdrawn	4		6	14	8	32
Appeals rejected jurisdiction/standing				4	2	6
Hearings held on the merits of appeals						
Oral hearings	2			5	4	11
Written hearings	1	1		1	4	7
Total hearings held on the merits of appeals	3	1		6	8	18
Total oral hearing days	5			21	11	37
Published decisions issued						
Final decisions	5	1		11	27	44
Costs decision		1		3		4
Preliminary applications	3			4	1	8
Consent Orders	1				1	2
Total published decisions issued	**9**	**2**		**18**	**29**	**58**

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This table provides a summary of the appeals filed, hearings held and published decisions issued by the Board during the report period, categorized according to the statute under which the appeal was brought.

Summaries of Environmental Appeal Board Decisions

April 1, 2010 ~ March 31, 2011

Appeal cases are not heard by the entire Board, they are heard by a "panel" of the Board. After an appeal is filed, the Chair of the Board will decide whether the appeal should be heard and decided by a panel of one or by a panel of three members of the Board. The size and the composition of the panel (the type of expertise needed on a panel) generally depends upon the subject matter of the appeal and/or its complexity. The subject matter and the issues raised in an appeal can vary significantly in both technical and legal complexity. The Chair makes every effort to ensure that the panel hearing an appeal will have the depth of expertise needed to understand the issues and the evidence, and to make the decisions required.

In terms of its decision-making authority, a panel has the power to confirm, vary or rescind the decision under appeal. In addition, under all of the statutes, a panel may also send the matter back to the original decision-maker with or without directions, or make any decision that the original decision-maker could have made and that the panel believes is appropriate in the circumstances. When an appellant is successful in convincing the panel, on a balance of probabilities, that the decision under appeal was made in error, or that there is new information that results in a change to the original decision, the appeal is said to be "allowed". If the appellant succeeds in obtaining some changes to the decision, but not all of the changes that he or she asked for, the appeal is said to be "allowed in part". When an appellant fails to establish that the decision was incorrect on the facts or in law, and the Board upholds the original decision, the appeal is said to be "dismissed".

Not all appeals proceed to a hearing and a decision by the Board. Some cases are withdrawn or abandoned by an appellant before a hearing. In other cases, an appellant's standing to appeal may be challenged, or the Board's jurisdiction over the appeal may be challenged, resulting in the Board dismissing the appeal in a preliminary decision. Some examples of these types of preliminary decisions are provided in the summaries below.

It is also important to note that many cases are also settled or resolved prior to a hearing. The Board encourages parties to resolve the matters under appeal either on their own or with the assistance of the Board. Sometimes the parties will reach an agreement amongst themselves and the appellant will simply withdraw the appeal. At other times, the parties will set out the changes to the decision under appeal in a consent order and ask the Board to approve the order. The consent order then becomes an order of the Board. The Board has included a description of a consent order in the summaries.

The summaries that have been selected for this Annual Report reflect the variety of subjects and the variety of issues that come before the Board in any given year. The summaries have been organized

according to the statute under which the appeal was filed. For a full viewing of all of the Board's published decisions and their summaries, please refer to the Board's web page.

Environmental Management Act

Industrial land fill expansion opposed by local citizens – "No Evidence Motion" at the hearing

In a hearing before the Board, an appellant presents his or her case first. Appellants have what is referred to as the onus, and the burden of proof, in an appeal: the appellant must prove his or her case on a balance of probabilities. In an appeal where there are disagreements about the facts (not a question of law alone), this burden of proof is accomplished through the presentation of evidence. An appellant has to present all of his or her evidence first, as the appellant is the one challenging the decision. An appellant must provide some credible evidence to support his or her claims otherwise there may be no need for the other parties to respond. If the other parties do not believe that there is any evidence provided in support of an appellant's claims, they may make a motion to dismiss all or part of the appeal.

This is what occurred in the decision.

2008-EMA-009(a) to 011(a) and 013(a) David Harris and Dennis Bremner (in their individual capacities and on behalf of certain members of the Powell River Legacy), Patricia Picken, Dr. F. Andrew Davis and Rhonda Alton v. Director, *Environmental Management Act* (Catalyst Paper Corporation and Catalyst Pulp Operations Limited, doing business as Catalyst Paper General Partnership, Third Party)

Decision Date: June 11, 2010

Panel: Alan Andison, Dr. Robert Cameron, Gabriella Lang

Catalyst Paper Corporation and Catalyst Pulp Operations, doing business as Catalyst Paper General Partnership ("Catalyst"), owns and operates a pulp and paper mill in Powell River. It holds a permit allowing certain waste from its mill operations to be deposited in a landfill that it operates in the Wildwood area of Powell River. The landfill has received refuse from the pulp and paper mill since the 1960s, and has operated under a permit since 1976.

In 2007, Catalyst applied to the Director, *Environmental Management Act*, for amendments to its permit that would allow it to expand its existing landfill. After a review by Ministry personnel, the Director issued an amended permit. The amended permit allowed Catalyst to expand the landfill's total capacity from 100,000 cubic metres to 620,000 cubic metres, and to increase its area from 2.3 hectares to 6.1 hectares. The refuse that could be discharged to the landfill remained the same under the amended permit: fly ash, waste asbestos and "miscellaneous mill waste" as defined in the permit. The amendments also included requirements for maintaining slope stability, monitoring dust fall and groundwater quality, and submitting annual reports, among other things.

In 2008, the Appellants filed separate appeals against this amended permit. They appealed on several grounds including concerns about the adverse effects of dust and leachate from the landfill,

groundwater contamination, slope instability, ongoing environmental protection at the landfill, financial security for closure and remediation costs of the landfill, and the adequacy of public consultation before the amendments were approved.

Motion to dismiss the appeals

At the hearing of the appeals, each Appellant presented evidence to support his or her respective case. At the conclusion of the evidence of one of the joint appellants, Catalyst asked the Board to dismiss the appeal on the grounds that these Appellants provided no evidence to support their appeal. The Board heard arguments on this request from all parties and issued its ruling at the hearing. This ruling was included in the written decision on the appeals.

The Board ruled that these Appellants had failed to meet the evidentiary burden on them regarding their argument that Catalyst should provide financial security in relation to the future closure of the landfill. However, the Board found that these Appellants provided some evidence of potential pollution impacts from the amended permit and allowed them to continue with their appeal on this particular issue. In response, these Appellants asked the Board to allow them to re-open their case and submit more evidence regarding Catalyst's finances, but the Board denied their request. They then submitted that the Board's refusal to allow them to re-open their case demonstrated bias by the Board. The Board held that its ruling did not indicate bias.

The Board then went on to hear evidence from the Director and Catalyst on the environmental issues raised by the Harris and Bremner appeal, as well as all of the issues raised by the other Appellants. The Board's decision on those issues is set out below.

The decision on the merits of the appeals

1. Adequacy of Public Consultation

The evidence established that Catalyst had posted public and written notices of the proposed amendments at least 30 days in advance (as required under the *Public Notification Regulation*), and that Catalyst conducted a year-long consultation process which included public meetings and open houses. It also established that the Director had logged all public comments, had ensured that Catalyst responded and addressed environmental issues in an environmental assessment report, and that the Director had responded to the issues raised through the public consultation process. In particular, the Director commissioned an independent assessment of the groundwater data, added additional dust monitoring locations, and added PCB testing to the groundwater monitoring requirements. The Board held that the consultation process was extensive, thorough, and exceeded the regulatory requirements.

2. Impact on Air Quality

The Board found that the Appellants provided no evidence to support their concern that fly ash would have an adverse effect on Catalyst's workers, or that the air quality at the Appellants' homes has been, or would be, adversely affected by the amendments. Rather, the evidence established that workers' exposure to fly ash would be well within health guidelines, and any dust and particulate emissions in areas surrounding the landfill would be below acceptable standards. Further, the amendments required ongoing control and assessment of dust and other air emissions from the landfill, and the monitoring data would be posted on Catalyst's website for the public to review. Based on the evidence, the Board concluded that the amendments adequately protect air quality.

3. Impact on Groundwater Quality

The Appellants were concerned that leachate would enter the groundwater. Although the Appellants established that the previous landfill had contaminated the groundwater, the evidence also established that groundwater conditions had improved after an asphalt cap was placed over the historic landfill to reduce leachate, and a leachate collection and control system had been installed. The Board found that the proposed design for the expanded landfill included a leachate collection system and an ongoing groundwater monitoring system designed to protect groundwater quality. The Board found that the Director had the benefit of extensive data and assessments regarding groundwater quality when she issued the amendments, and that the Director may impose further amendments in response to any changing circumstances regarding groundwater quality. Consequently, the Board found that the amendments provide adequate protection for groundwater quality.

4. Impact on Slope Stability

The Board found that the Appellants provided insufficient evidence to support their slope stability concerns. The permit amendments required the design and construction of the expanded landfill to protect slope stability, and provided for ongoing monitoring of slope stability. The Board noted that the Director could make further amendments to the permit if conditions changed. The Board concluded that the amendments protect slope stability at the site.

5. Whether Financial Security was Properly Considered

Regarding Catalyst's financial health, the Board found that the Director did consider Catalyst's financial obligations with respect to landfill closure costs, and that the amendments included conditions that ensure that there will be financial security to protect the environment during closure.

6. Whether the Amendments would Protect the Environment

The Board found that the amendments include several conditions designed to protect against future unforeseen events that could adversely affect the environment, and that the permit could be amended in the future if changes are required to protect the environment.

The appeals were dismissed.

A Hot House Issue for Vegetable Producers: how to fuel their greenhouses

For many greenhouse operators in British Columbia, the choice of fuel to heat greenhouses has been limited in recent years due to concerns with pollution. In the Lower Mainland, greenhouse operators burning wood-waste were required to change to natural gas as a result of a Greater Vancouver Regional District (now Metro Vancouver) bylaw. This resulted in appeals to the Board (see for example: *Houweling Nurseries Limited v. District Director of the Greater Vancouver Regional District* (2003-WAS-004(c), January 23, 2008); *Darvonda Nurseries Ltd. v. District Director of the Greater Vancouver Regional District* (2006-EMA-007(a), July 27, 2007)).

More recently, the Provincial Government turned its attention to the burning of coal as a concern. The Ministry of Environment decided to restrict the use of coal for agricultural operations. However, prior to doing so, it implemented a transition policy to provide some time for greenhouse operators to change their fuel source from coal to a non-coal source. In April of 2007, it directed its decision-makers to only issue 15-month approvals for greenhouses wanting authorization to discharge coal emissions to the air. Permits for emissions from coal burning boilers were prohibited in December of 2008.

The following appeal resulted from this change in government policy regarding the use of coal by greenhouse operators.

2008-EMA-017(a) Fiesta Greenhouses Ltd. v. Director, *Environmental Management Act*

Decision Date: February 3, 2011

Panel: Alan Andison

Fiesta Greenhouses Ltd. is a relatively small family run business located in Campbell River, BC. It grows vegetables in its greenhouses and sells them at a local farmers' market, and to grocery stores and distributors on Vancouver Island and the Lower Mainland. From early February until the end of October each year, its greenhouses need to be heated to support plant growth. In 2001, Fiesta began burning coal obtained from a nearby mine to heat the greenhouses.

In March of 2007, the Ministry advised Fiesta that it must have a permit or approval in order to discharge its coal emissions to the air.

Fiesta applied for an approval to discharge air emissions from its coal-fired boilers in February of 2008, and it was denied approval by the Director in September of 2008. Fiesta appealed this refusal to the Board.

Fiesta argued that it had investigated the alternative fuels that were locally available, such as wood pellets and natural gas, and it had found that they were more expensive and, in some cases, incompatible with Fiesta's boilers. It also said that it could not afford to renovate its boilers, no one had ever complained about emissions from its boiler, and it provides local food and employment. Fiesta also advised that, if the Board would allow it to continue to use its coal-fired boilers, it would continue to explore alternative fuels as they become locally available.

The Director pointed out that between the time that Fiesta was first notified of the need for a permit or approval and the time that it actually applied for the approval, the law had changed. In December 2008, the *Agriculture Waste Control Regulation* was amended. It removed coal from the list of allowable fuels for use in agricultural operations. The Director argued that since coal is no longer an approved fuel, the Board should uphold his decision to refuse the approval.

The Board considered the provisions in the *Environmental Management Act* that relate to permits and approvals. The Board found that the prohibitions relating to permits in section 14(3) of the *Environmental Management Act* do not apply to approvals, which are issued under section 15 of that Act. In addition, the Board found that there are policy reasons for not applying those restrictions to approvals. In particular, approvals are only valid for a maximum of 15 months; they provide decision-makers with flexibility to allow an activity for a short period of time that may not be desirable over the long term, and allow a period of transition to new regulatory standards.

The Board then considered the evidence presented regarding Fiesta's operations. It found that particulate emissions from Fiesta's boilers slightly exceed the previous maximum limit under the regulations, and exceed the current maximum limit by 70 mg per cubic metre. The Board found that it was important for Fiesta to reduce its particulate emissions. However, the Board also considered the fact that Fiesta uses coal from a local supplier, that its operations are relatively small, and that it sells its products locally. Although the latter considerations are not expressly identified in the *Environmental Management Act*, the Board found that they are relevant when considering the overall environmental impact of the Appellant's operations. Based on those considerations, and the lack of public complaints about emissions from its operations, the Board concluded that it was appropriate to issue an approval to allow Fiesta to burn coal as an interim measure. The Board sent the matter back to the Director with directions to issue an approval valid for 15 months from the date of the Board's decision.

Accordingly, the appeal was allowed.

Parties resolve appeal without the need for a hearing regarding a mushroom composting operation

As stated in the opening comments to the Summaries section of this report, many appeals are resolved without the need for a hearing. Sometimes the parties are able to reach an agreement and include the terms of the agreement in a "consent order", which is then submitted to the Board for approval. The next summary is an example of such a case.

2008-EMA-020(a) Farmers' Fresh Mushrooms Inc. v. Director, *Environmental Management Act* (H.V. Truong Ltd. and A-1 Mushroom Substratum Ltd., Third Parties)

Decision Date: September 7, 2010

Panel: Alan Andison

In November of 2008, the Director issued a pollution prevention order to Farmers' Fresh Mushrooms Inc., and two other companies, to address an escape of agricultural and compost waste from a mushroom composting and growing facility located in Langley, BC. The pollution prevention order required the three companies to cease all activities that were producing leachate at the facility, and to take a number of steps to prevent the escape of waste from the facility before mushroom composting and growing operations could resume. Farmers' Fresh appealed the order, as did the other two companies. The Board decided to hear all of the appeals together.

Before the appeals were heard, the other two companies asked that their appeals be held in abeyance to allow them time to make upgrades to the facility and complete other work required by the order. The Board granted that request, along with two further requests from them to extend the period of abeyance.

In April 2010, Farmers' Fresh advised the Board that it had not been involved in the mushroom composting and growing operations at the facility, and it was not involved in work being done to comply with the order. It submitted that it should be removed from the order. The Director did not oppose that request.

Subsequently, the parties negotiated an agreement to remove Farmers' Fresh from the order. This agreement was set out in a Consent Order that was approved by the Board.

The appeal of Farmers' Fresh Mushrooms Inc. was allowed, by consent.

The Board accepts an appeal of a contaminated site

The *Environmental Management Act* limits what can be appealed to the Board through the definition of "decision". The types of "decisions" that may be appealed are defined in section 99 of the Act as follows:

99 For the purpose of this Division [Appeals], "decision" means

(a) making an order,

(b) imposing a requirement,

(c) exercising a power except a power of delegation,

(d) issuing, amending, renewing, suspending, refusing, cancelling or refusing to amend a permit, approval or operational certificate,

(e) including a requirement or a condition in an order, permit, approval or operational certificate,

(f) determining to impose an administrative penalty, and

(g) determining that the terms and conditions of an agreement under section 115 (4) have not been performed.

Before the Board can accept an appeal, it must be satisfied that the appeal is against one of these types of decisions. Where there is some doubt, the Board will ask the parties to provide written argument on whether or not the "decision" sought to be appealed

fits within the definition. The Board then deals with this as a preliminary question of its jurisdiction.

Over the years, the Board has interpreted this definition and considered its jurisdiction over an appeal on numerous occasions (see, for example: *Canadian National Railway Company v. Regional Waste Manager* (2001-WAS-025, May 24, 2002); *Beazer East, Inc. v. Assistant Regional Waste Manager* (2003-WAS-002(a), February 5, 2004); *Houweling Nurseries Ltd. v. District Director for the Greater Vancouver Regional District* (2002-WAS-025(a) and 2003-WAS-004(a), April 26, 2004); and *Shell Products Canada Limited and Imperial Oil Limited v. Director, Environmental Management Act* (2006-EMA-013(a) and 014(a), June 11, 2007)).

The decision summarized below required the Board to decide whether a Director's refusal to either grant or refuse an application unless a condition(s) was met, was an appealable decision.

2010-EMA-007(a) 455161 BC Ltd. v. Director, *Environmental Management Act*

Decision Date: August 25, 2010

Panel: Alan Andison

In May of 2007, 455161 BC Ltd. (the "Company") applied to the Director for a certificate of compliance (the "Certificate") in relation to the remediation of a contaminated site conducted at the Appellant's property in Westbank, BC. The Company was advised that the Director would neither reject nor approve the application for a Certificate unless the Company agreed to remediate certain property adjacent to its property. The Company appealed this to the Board and asked the Board to issue the Certificate.

Before accepting the appeal, the Board requested submissions from the parties on the question of whether the Director's response constituted an appealable "decision" as defined in section 99 of the *Environmental Management Act*.

The Company submitted that the Director's response amounted to either "exercising a power" under section 99(c), or "imposing a requirement" under section 99(b), of the Act. The Director argued there had been no approval or refusal of a Certificate and that the appeal should be dismissed for lack of jurisdiction because no appealable "decision" had been made.

The Board confirmed that the decision-making powers referenced in the definition of "decision" must be found in the Act's provisions, as held in previous decisions of the Board and in the BC Supreme Court's decision in *Imperial Oil Ltd. v. Ron Driedger*, 2002 BCSC 219. Based on the evidence of communications from the Director's legal counsel to the Appellant, the Board concluded that the Director's response to the Company's application for a Certificate was an appealable decision. It amounted to either "imposing a requirement" within the meaning of section 99(b), or "exercising a power" within the meaning of section 99(c). However, the Board made no findings on whether the Director had the jurisdiction, based on the facts in this case, to either impose a requirement or withhold a Certificate, because those questions went to the merits of the appeal and could not be decided in a preliminary proceeding.

The appeal was accepted as being within the Board's jurisdiction.

Greenhouse Gas Reduction (Cap and Trade) Act

There were no decisions by the Board during this reporting period.

Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act

There were no decisions by the Board during this reporting period.

Integrated Pest Management Act

Potential harm from invasive gypsy moths found to outweigh potential risks from aerial spray program over Richmond, BC

The North American strain of European gypsy moth (*Lymantria dispar*) is an insect that attacks both natural forests and urban trees. While there are no permanent populations of gypsy moths in BC, they enter the Province by way of personal and commercial goods, and on the vehicles that transport them.

The moths were first discovered in the Province in 1978. The Provincial Government considers these moths to be a threat to BC's ecology and economy, and has adopted a management objective to reduce the number of gypsy moth entering the Province, and to eradicate any that do before they become permanently established. It manages the moths through detection programs and an eradication program. In some circumstances, the method of eradication is through the aerial spraying of the pesticide Foray 48B (active ingredient *Bacillus thuringiensis var. kurstaki* ("Btk"). However, before aerial spraying takes place, a permit is required. These permits may be subject to an appeal to the Board.

Over the years, a number of permits for aerial spraying of Btk have been issued, and the Board has heard many appeals from members of the public concerned about the impact of such spraying on human health and the environment. The following appeal was filed in 2010 against a permit issued to the Minister of Forests and Range that allowed aerial spraying of Btk over parts of Richmond, BC.

2010-IPM-001(a) Caryl and Jeff Jones v. Administrator, *Integrated Pest Management Act* (Minister of Forests and Range, Third Party)
Decision Date: April 14, 2010
Panel: Alan Andison

In February of 2010, the Administrator, *Integrated Pest Management Act*, issued a permit authorizing the Minister of Forests and Range to conduct up to four aerial applications of Foray 48B ("Btk") over parts of Richmond, BC, between April 15, 2010 and June 30, 2010. The permit was issued in an effort to eradicate introduced populations of the European gypsy moth from a specified area in Richmond. Caryl and Jeff Jones, whose principal residence was within the area to be sprayed, appealed the permit.

The Appellants' appealed on the grounds that they both have health conditions which may be negatively impacted by exposure to Btk. In addition, they were concerned that the pesticide use would adversely affect the health of the general population and non-target species. They asked the Board to rescind the permit. In the alternative, if the spraying was allowed to proceed the Appellants asked the Board to make a number of orders that would apply to the permit holder and other government agencies.

The Appellants also requested a stay of the permit, and requested an order requiring the Permit Holder to pay the Appellants' costs to bring the appeal. The Board conducted an expedited hearing of the appeal due to the need for a decision on the appeal before spraying could commence.

Preliminary issue of jurisdiction

After the appeal was filed, the Permit Holder raised a preliminary issue regarding the Board's jurisdiction over the appeal. The Permit Holder submitted that section 14 of the *Integrated Pest Management Act* only allows appeals of the terms or conditions of a permit, but not the permit itself, which was what the Appellants sought to appeal. The Board issued a preliminary decision finding that section 14 only allows appeals of the terms or conditions of a permit. Consequently, the Board concluded that it could not grant one of the remedies sought by the Appellants; namely, rescinding the permit. However, the Board decided that the Appellants' concerns related to certain conditions in the permit were appealable, and therefore, the Board declined to dismiss the appeal in its entirety. The Board went on to consider the merits of the appeal.

The decision on the merits of the appeal

The Board reviewed the terms and conditions in the permit that were of concern to the Appellants. The Board found that those terms and conditions were added at the discretion of the Administrator, and were appealable under section 14(1)(b) of the Act.

The Board next considered whether the terms and conditions of the permit would cause "an unreasonable adverse effect", which is the overarching test set out in the Act. To make this determination, the Board applied a two-step test; namely, (1) whether the conditions in the permit would have an adverse effect on humans, animals or the environment; and (2) if there will be an adverse effect, whether that adverse effect is reasonable based on a cost-benefit analysis.

The Board held that the use of the pesticide as authorized by the conditions in the permit may have an adverse effect on non-target moths and butterflies in the spray zone. However, the Board also found that the conditions in the permit were reasonable and appropriate. In particular, the Board found that expansion of the gypsy moth population would cause damage to both the environment and the economy of BC, and that aerial spraying of the pesticide was the most appropriate and effective method for eradicating the gypsy moth in the spray area. In addition, the Board held that the adverse effect on non-target moths and butterflies would be temporary. In all of these circumstances, the Board concluded that there would be no unreasonable adverse effects from the use of the pesticide in accordance with the permit conditions, because the potential adverse effect from the pesticide use did not outweigh the potential harm to the environment and the economy if the gypsy moth population became established.

Regarding the alternative orders sought by the Appellants, the Board concluded that the orders were either beyond the Board's jurisdiction or should be denied based on the Board's conclusions on adverse effects. The Board also denied the Appellants' application for costs, as there were no special circumstances that warranted an award of costs against the Administrator or the Third Party.

The appeal was dismissed. The application for costs was denied.

Water Act

In city centres, water is something that is often taken for granted as it is readily available by simply "turning on a tap". However, for many people in the Province, water is obtained from local streams and creeks. To divert and use water from a creek or stream, a person must first obtain a water licence from the responsible ministry. There are water licences for domestic use, irrigation, commercial purposes and for power purposes.

If a person applies for a licence and it is refused, that person may appeal the refusal to the Board. If a licence is granted, other affected licensees, riparian owners or applicants for a licence may appeal. These latter appeals are often filed due to concerns that there is simply insufficient water available for the people who are already licensed to use it, and/or that it will create environmental problems. These appeals can be extremely contentious, emotionally charged and are difficult to resolve.

In addition to licensing decisions, the Board often receives appeals from orders made by regional managers or engineers under the *Water Act*.

Over the past 15 years, a significant proportion of the appeals heard by the Board have been appeals filed under the *Water Act*. As is evident from the number of decisions summarized below, this Annual Report period is no different.

McFayden Creek: licenses for domestic water and power generation uses in dispute

2005-WAT-024(c) and 2005-WAT-025(c) Barry Burgoon, Marilyn Burgoon and Helen Elzinga v. Regional Water Manager (Christopher and Birgit Chart, Third Party; McFayden Creek Water Users Community, Participant)

and

2005-WAT-026(c) Christopher and Birgit Chart v. Regional Water Manager (Barry Burgoon, Marilyn Burgoon and Helen Elzinga, Third Parties; McFayden Creek Water Users Community, Participant).

Decision Date: June 28, 2010

Panel: Lynne Huestis, Stephen Willett, J. Alex Wood

McFayden Creek is located in the Nelson Water District. It is a licensed source of domestic and irrigation water for many households, but is known to suffer from low water flows for up to seven months of the year.

In 2004, Christopher and Birgit Chart purchased a property in a rural area within the Kootenay District. McFayden Creek runs through the northern part of the property, so the Charts applied for two conditional water licences: one to divert water from McFayden Creek for their domestic use, and one to use the Creek to generate electricity via a small micro hydro project (a licence for power purposes).

In 2005, the Regional Water Manager refused to issue them a licence for domestic use, but did grant a licence allowing them to divert and use water from the Creek, throughout the year, for residential power purposes (the "Licence"). The Licence also authorized the construction of certain works for the project; in particular, a weir to collect and divert water into a pipeline (i.e., penstock) which would transport water to a turbine in a powerhouse. The water would ultimately be discharged into a tailrace and returned to the Creek.

The exact alignment of the pipeline and the location of the turbine were not finalized when the Licence was issued, but the Licence required the final design and construction of the works to be supervised by a professional engineer. Since part of the project would be built on Crown land, a permit allowing occupation of Crown land was also issued to the Charts.

Barry and Marilyn Burgoon and Helen Elzinga (the "Burgoons") are local residents with farms downslope of McFayden Creek. They appealed the issuance of the Licence on several grounds, including that the Licence posed a risk to the homes, properties, water and the lives of residents located down slope of McFayden Creek. The Burgoons also appealed the permit allowing the licensed works to occupy Crown land.

The Charts appealed some of the conditions attached to the Licence, as well as the Regional Water Manager's refusal of a domestic water licence. The appeals by the Charts and the Burgoons were heard together.

The oral hearing took 12 days, and there were several adjournments before and after the oral hearing commenced to address issues including: pre-hearing disclosure, standing, jurisdiction, and the admissibility of evidence. The hearing concluded in writing in 2009. At the conclusion of the hearing, the Board received three applications for costs: the Burgoons applied for costs against the Charts; the Charts applied for costs against the Burgoons; and, the Regional Water Manager applied for costs against the Burgoons.

The Burgoons' Appeals

The Board dismissed the Burgoons' appeal of the permit to occupy Crown land, on the basis that the Burgoons did not pursue that matter during the hearing. It also dismissed the Burgoons' appeal of the Licence. Although the Board added three conditions to the Licence, the Board found that the Licence was properly issued. Specifically, and in response to the Burgoons' arguments, the Board found as follows:

1. Water Reserve

The Board concluded that McFayden Creek is not subject to a water reserve restricting the issuance of water licences without the Minister's approval. Based upon the language in the order-in-council that declared the water reserve, the Board held that the water reserve applied to the Kootenay River, but not its tributaries such as McFayden Creek.

2. Columbia Basin Management Plan

The Board found that there was no evidence that the Regional Water Manager failed to consider the Columbia Basin Management Plan, or that the Plan was relevant to the issuance of the Licence.

3. Precautionary Principle

The Board held that the precautionary principle does not apply when determining whether a water licence should be issued under the *Water Act*, and even if it did apply, there is no clear statutory direction as to which version of the precautionary principle would apply. However, the Board concluded that it was appropriate for the Regional Water Manager, in exercising his broad discretion to issue licences, to consider the potential adverse impacts of the proposed micro-hydro project on other water users and environmental values.

4. Potential Adverse Impacts

The Board concluded that the micro-hydro project did not pose a risk of pipeline failure, nor did the placement of the pipeline increase the existing natural risk that debris flows, sloughing or landslides would occur in the area. However, the Board added a condition to the Licence to provide additional protection from the natural risks associated with high water flows during freshet.

The Board found that the Licence would not have a negative effect on the quantity of water available to other licensees, or on water quality in the Creek. The Board held that the Regional Water Manager did not err in assessing the potential risks associated with the project, or in issuing the Licence with the condition that the works be designed and constructed under the supervision of a professional engineer, rather than specifying the precise location of the pipeline and turbine components. However, the Regional Manager proposed, and the Board agreed, that two conditions should be added to the Licence to provide additional assurance that the works will be constructed in a safe manner.

5. Alternative Power Sources

Finally, the Board concluded that the *Water Act* did not require the Regional Water Manager to consider whether other power sources were available to the Charts, in the context of assessing their licence application.

The Charts' Appeal

Regarding the Charts' appeal of the refusal of a domestic water licence, the Board concluded

that McFayden Creek is fully recorded, and that the Regional Water Manager correctly refused their application for a domestic licence.

The Board then reviewed the Charts' appeal of certain Licence conditions. The Board held that the condition imposing a residual stream flow requirement was unjustified and should be removed. In particular, the Board found that the residual flow requirement was based on general guidelines, whereas the site-specific evidence established that the Creek has no fish. Also, for much of the year, the surface flow in the Creek channel dries up before the point where the Creek joins a fish-bearing stream, and there was no evidence that any subsurface flows from the Creek carry nutrients to that stream. Regarding the condition requiring water to be returned to the Creek above an existing water survey station and downstream points of diversion, the Board accepted the Regional Water Manager's recommendation that downstream points of diversion should remain protected, but the condition should be varied in relation to the water survey station, to take into account engineering and environmental concerns.

The Board also found that the condition requiring the Charts to install a "flow meter" should be varied to refer to a "measuring device" instead of a "flow meter", and it varied three other conditions: to allow works located more than 5 metres from the top of the Creek bank to be constructed at any time of year; to allow the supervising professional engineer to determine whether a silt fence should be installed to prevent material from entering the Creek during construction of the works; and, to indicate that the Charts must supply downstream licensees with water during construction of the works, "if required".

Applications for Costs

Regarding the applications for costs, the Board determined that all of the parties contributed to delays and additional expenses in the appeal process. The Board decided not to award costs to any of the parties.

In summary, the Burgoons' appeals were dismissed. The Charts' appeal was allowed, in part.

All three of the applications for costs were denied.

Low water levels in Lazy Lake prompts an application to divert water into the Lake

2009-WAT-013(a) Warren Bridger v. Assistant Regional Water Manager (Regional District of East Kootenay, Third Party; Howard W. Pickering and Diane R. Pickering, and Gary J. Olafson, Participants)

Decision Date: August 4, 2010

Panel: R.G. (Bob) Holtby

This appeal relates to a 2008 application for a water licence to divert two cubic feet per second ("c.f.s.") of water from Lewis Creek to Lazy Lake during August and September of each year. However, the problems leading up to this application go back many years.

Lazy Lake is located near Wasa, BC. Lewis Creek flows near Lazy Lake. According to the evidence accepted by the Panel, in or about the early 1900s, Lazy Lake was smaller than it is today. Over the years, it increased in size as a result of runoff from irrigation on adjacent lands and eventually became a recreational lake. In 1965, a water licence was issued to several owners of cottages on Lazy Lake, authorizing them to divert 5 c.f.s. of water from Lewis Creek to Lazy Lake between May 15 and July 31 of each year, presumably to maintain the lake level during the summer. In the early 1970s, those water rights were transferred to the Regional District of East Kootenay (the "Regional District") so that it could carry out improvements to the diversion structures used to maintain the water level in Lazy Lake. In 2004, a

second water licence was issued to the Regional District, authorizing the diversion of 5 c.f.s. of water from Lewis Creek to Lazy Lake between October 1 and November 30 of each year.

The Appellant, Mr. Bridger, owns property on Lazy Lake and is a Director of the Lazy Lake Environmental Association. This Association has 34 members whose "sole purpose is to safeguard the environment of Lazy Lake and surrounding area." Mr. Bridger advised that the members of the Association have been the sole operators of the Lewis Creek diversion and have controlled the lake level, cleaned the diversion on an annual basis at their own expense, installed measuring stations and monitored the lake levels. However, as they do not hold the licences for the diversion, the landowners must rely on the Regional District to obtain any changes to the water rights.

Sometime prior to 2008, the landowners asked the Regional District to apply for a further water licence to divert 2 c.f.s. of water from Lewis Creek to Lazy Lake during August and September of each year in order to deal with a number of issues resulting from low lake levels. Those issues include: "duck itch" (a skin condition caused by water borne parasites), an increase in aquatic weed growth, a rise in water temperature during the summer months and the continued destruction and death of aquatic life. In 2008, the Regional District applied for this licence.

The Assistant Manager refused that application on the basis that there is insufficient water in Lewis Creek to grant the licence. Mr. Bridger appealed on the basis that the water lost from Lazy Lake ultimately flows back into Lewis Creek, and therefore, the licence should be granted.

Although there was a great deal of evidence and argument regarding the history of the lake and the licenses, the issue in this case came down to whether there was sufficient water in Lewis Creek to allow the application. The Board considered the parties' evidence regarding drainage flows from Lazy Lake, the existing amount of licensed water use on Lewis Creek, and the amount of in-stream flow that should be retained in Lewis Creek to meet requirements for fish and downstream benefits. The Board held that there was no evidence that any flow from Lazy Lake returns to Lewis Creek, and that there was no additional water available in Lewis Creek for diversion during August and September. For these reasons, the Assistant Manager's refusal was upheld, and the appeal was dismissed.

Neighbours at odds over water licences on a Gulf Island

2010-WAT-001(a) Tim Coertze and Sara de Rose v. Assistant Regional Water Manager (Albion Samuel Tidler, Third Party).

and

2010-WAT-003(b) and 004(a) Albion Samuel Tidler v. Assistant Regional Water Manager (Tim Coertze and Sara de Rose, Third Parties).

Decision Date: March 14, 2011

Panel: Gabriella Lang

In this decision, the Board addressed three separate appeals that were heard together. All of the appeals were against decisions of the Assistant Regional Water Manager regarding applications for water licences on Holmes Creek, located on Lasqueti Island, BC. Tim Coertze and Sara de Rose appealed the refusal of their application for a water storage licence associated with a residential power project. Albion Samuel Tidler appealed the issuance of a domestic water licence to Mr. Coertze and Ms. de Rose, as well as the issuance of a water licence for residential power purposes to them. The background to these appeals is as follows.

These Appellants own adjoining property. Holmes Creek flows through the de Rose/Coertze property, and two swamps straddle the Appellants' properties. In April of 2009, the Ministry of

Environment received a complaint that a dam constructed on the de Rose/Coertze property was affecting one of the swamps. The Ministry investigated and found that all of the Appellants had constructed works on Holmes Creek and were withdrawing water without authority. On their property, Mr. Coertze and Ms. de Rose had constructed a road which ran over a dam with a culvert in it, adjacent to one of the swamps. They had also installed a water wheel to generate power for their home. The Ministry directed all three Appellants to submit applications for water licences to legalize their activities, which they did. Mr. Tidler's applications and resulting decisions are not part of these appeals. However, the applications by Ms. de Rose and Mr. Coertze and the resulting decisions are the subject of these appeals.

In 2009, Ms. de Rose and Mr. Coertze applied for licences authorizing water storage and power generation. They also applied for a domestic water licence to support a future dwelling. On January 21, 2010, the Assistant Regional Water Manager issued a licence for domestic water as well as a licence for residential power purposes. He refused to issue a licence for water storage associated with the residential power project.

Mr. Tidler appealed the issuance of the two licences on the basis that: (1) the licensing process was flawed as he did not receive proper notice of what was being applied for and there were differences between the applications and the licenses; (2) the licences should not have been issued because Mr. Coertze and Ms. de Rose were violating the *Water Act*; and, (3) the licences do not protect Mr. Tidler's property from flooding caused by the dam construction, the failure to keep the culvert clear and the failure to manage beaver activity in the swamp.

Mr. Coertze and Ms. de Rose appealed the refusal to issue the storage licence on the basis that water storage is part of their residential power project and is needed during the winter months.

The Board found that Mr. Tidler received timely and sufficient notice of the licence applications, as indicated by the fact that he had time to provide written objections to the Assistant Regional Water Manager. In addition, the Board found that there were no irregularities or deficiencies in the licensing process, and even if there had been any procedural deficiencies, they were cured because the Board conducted the appeals as new hearings of these matters.

The Board also considered whether the dam and plugging of the culvert was causing flooding on Mr. Tidler's property. The Board found that there was evidence of flooding on Mr. Tidler's property, but the dam and/or plugging of the culvert were not the likely cause. There was credible evidence of other likely causes, such as beaver activity in the area.

Next, the Board considered whether each of the licensing decisions were reasonable exercises of discretion.

The Board found that the Assistant Regional Water Manager had good reasons for refusing to issue the storage licence. In particular, the Ministry had concerns about the dam structure and had not yet decided whether the dam should be approved. In addition, the Assistant Regional Water Manager had asked the three Appellants to negotiate a joint landowner agreement for managing the swamp because the Appellants' activities in the swamp affected each other's properties; however, they failed to reach an agreement. The Board held that the Appellants' failure to reach a consensus on managing the swamp provided a basis for refusing the storage licence.

Regarding the residential power licence, the Board found that there is no requirement in the *Water Act* to refuse a licence just because water is being diverted or works have been constructed without authority. By requiring the Appellants to apply for licences, their water uses were brought into compliance and could be regulated. In addition, to

address Mr. Tidler's concerns about flooding and the dam, the Ministry had issued separate orders requiring Mr. Coertze and Ms. de Rose to keep the culvert clear, and requiring them to construct a spillway to temporarily secure the dam.

Finally, the Board found that there was sufficient water supply to support the domestic water licence, and there was no evidence that the licence would adversely affect Mr. Tidler's property.

All three appeals were dismissed.

Application for a stay granted to ensure a meaningful right of appeal

2010-WAT-014(a) Canadian Pacific Railway Company v. Engineer under the *Water Act* (John Pozer and Lorraine Jamison, Vaughan and Sheridan Clements, and Attorney General of Canada (Minister of Fisheries and Oceans), Third Parties)

Decision Date: August 30, 2010

Panel: Robert Wickett

Canadian Pacific Railway Company ("CPR") appealed an order issued by an Assistant Regional Water Manager in his capacity as an Engineer under the *Water Act*. The order stated that CPR re-aligned a stream without authority and required CPR to prepare a work plan to return the stream channel and certain rail crossings to their original location, and remediate affected lands to a satisfactory condition. The work plan was required by July 16, 2010, and the work was to be completed during the fisheries window of August through September 15, 2010.

As a preliminary matter, CPR asked the Board to "stay" the order pending a decision from the Board on the merits of the appeal. The Board heard the stay application on an expedited basis, because the merits of the appeal could not be decided before September 15, 2010 when the work was to be completed.

The Engineer consented to the stay application, but the Third Parties (other than the Attorney General of Canada, who made no submission) opposed the stay application. The Third Parties alleged that the diversion of the stream had caused damage to their properties and adversely affected their use and enjoyment of their properties. CPR submitted that it had altered the stream based on directions issued by the Department of Fisheries and Oceans to address concerns about fish passage.

In determining whether a stay ought to be granted, the Board applied the three-part test set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*. With respect to the first stage of the test, the Board found that CPR had raised serious issues to be tried including questions of fact and credibility, which were not frivolous, vexatious or pure questions of law.

Regarding the second part of the test, the Board found that the appeal would likely be moot if a stay was denied, and this would constitute irreparable harm to CPR. The Board found that the Third Parties may suffer continuing harm to their interests if a stay was denied, but they could receive compensation. Further, the Board held that there was no evidence that maintaining the *status quo* would cause harm to the environment.

Regarding the third part of the test, the Board found that the balance of convenience favoured granting a stay as it ensured that CPR would have a meaningful right of appeal.

The application for a stay was granted.

Water Users' Community Association not entitled to notice of decisions that would have no injurious affect on its rights

2010-WAT-011(a) & 2010-WAT-012(a) Campbell Creek Water Users' Community Association v. Assistant Regional Water Manager (Richard and Lynda Baldelli, Ida Marie Roddan, and Glen and Jutta Jealouse, Third Parties)

Decision Date: March 25, 2011

Panel: Tony Fogarassy

The Campbell Creek Water Users' Community Association (the "Association") appealed the decisions of the Assistant Regional Water Manager to issue two conditional water licences authorizing the use of water from Campbell Creek, near Kamloops, BC. Together, the two licences authorized the use of 35 acre feet of water per year for irrigation purposes. The licences were issued in partial substitution for a previous licence that authorized the use of 50 acre feet of water per year from Campbell Creek for irrigation purposes. When the two new licences were issued, the remaining 15 acre feet of water authorized under the previous licence was declared to be abandoned. Also, one of the new licences was appurtenant to the property that was appurtenant to the previous licence, whereas the other licence involved a transfer of appurtenancy to a different property. Both licences involved the use of water stored under a storage licence held by the Association, which owns and manages dams on Campbell Creek to support numerous irrigation licences in the area.

The Association appealed the issuance of the two licences on the basis that it was entitled to receive notice of the applications for the licences, and it received no such notice. The Assistant Regional Water Manager argued that he was not obligated under the *Water Act* to provide notice of the applications to the Association because the Association's rights would not be injuriously affected by his decisions.

The Board found that sections 18, 19 and 20 of the *Water Act* applied in this case. Those sections provide the Assistant Regional Water Manager with the discretion to dispense with providing notice of the licensing decisions if no rights would be injuriously affected by the decisions being contemplated. The Board found that no rights of the Association would be injuriously affected by the issuance of the licences in partial substitution for the previous licence, or the transfer of appurtenancy and the abandonment of the remaining rights under the previous licence, because the result was a net reduction in water use of 15 acre feet per year. In addition, the Board found that there was no evidence that the rights of the Association, any other licensee or person, would be injuriously affected by the licensing decisions. Moreover, the Board held that the decisions actually benefitted the Association, because an additional 15 acre feet of water became available for storage.

Finally, the Board noted that the Assistant Regional Water Manager is not obligated under the *Water Act* to seek the Association's approval before making decisions of this nature.

The appeals were dismissed.

Wildlife Act

The summaries of decisions made under this Act during the report period have been divided under two general headings:

(1) hunting quota appeals, and

(2) other issues.

(1) Hunting Quota Appeals

Under the *Wildlife Act*, non-resident hunters may hunt for big game only if guided by a licensed guide outfitter, and only within the territory in which the guide is permitted to operate. Section 60 of the *Wildlife Act* authorizes managers to issue annual species quotas to guide outfitters as a condition of their annual guide outfitter licence. In addition, managers issue species allocations that cover multi-year periods. The quotas and allocations limit the number of each species that may be harvested by the guides' clients over the period specified. The multi-year allocations allow a guide to exceed the annual quota by a set number, but that number then counts against the multi-year allocation. The multi-year allocations give guide outfitters flexibility in their annual harvests, and are used for harvest planning purposes.

Quota and allocation decisions are generally issued within a region in or around the same time. As a result, the Board may receive a number of appeals by guide outfitters within a particular region. Rather than holding many hearings, the Board generally joins the appeals to be heard together. This reduces cost and duplication of evidence.

The number of appeals filed by guide outfitters typically increases when there is a change to the government's quota or allocation policy. This is what happened during this reporting year. In 2007, the province adopted a new harvest allocation policy which, in subsequent years, led to reduced annual quotas and multi-year allocations for some guide outfitters. The Board received a number of appeals from guide outfitters whose quotas and allocations had been reduced due to the new policy, among other things. The majority of the appeals decided in the report period related to decisions made in two regions: the Cariboo Chilcotin region, and the Skeena region.

Cariboo Chilcotin Region – Moose Quotas

2009-WIL-003(a) to 017(a) and 2009-WIL-019(a) to 020(a) Steven Hoessl, Allan Tew, Hans Albert Jacobs, Richard Braun, Stuart G. Maitland, Jim Linnell, Darrel Collins, Brent Giles, Bradley R. Bowden, Chris Franke, Kevan Bracewell, David Harrington, Al Madley, Stewart Fraser, Frank Thiel, Dave Altherr and David Dorsey Jr. v. Regional Wildlife Manager (B.C. Wildlife Federation and Cariboo Chilcotin Guide Outfitters Association, Participants)

Decision Date: August 3, 2010

Panel: Gabriella Lang

The seventeen Appellants identified above are guide outfitters who take non-resident hunters on guided hunts for big game, including moose. They each appealed their annual moose quotas for 2009, and their 3-year allocations for moose for 2009 to 2011. These quota and allocation decisions were issued by the Regional Wildlife Manager, Cariboo Chilcotin Region. Although the allocations were for 2009, the appeal hearing was not heard until late in 2009 to allow time for dispute resolution. As the parties were unable to reach any agreement, they requested that the Board proceed with the hearing.

There were two changes to government decision-making that prompted the large number of appeals filed with the Board in this region: (1) this was the first time the government's new 2007 harvest allocation policy was applied and, (2) the Ministry had revised its estimate of the moose annual allowable harvest for the region, and adopted a new process for allocating the portion of that harvest available to non-resident hunters among the individual guide outfitters in the region. Compared to previous years, most of the Appellants' 2009 quotas and 3-year allocations of moose were reduced by approximately 20% or more.

The Appellants asked the Board to send the decisions back to the Regional Manager with certain directions.

The Board first considered whether the appeals were moot. The Regional Manager argued that the appeals were moot because the 2009 moose hunting season was over when the appeals were heard. The Board found that the appeals were not moot, because the appealed decisions included both the 2009 quotas and the 3-year allocations; the 3-year allocations applied for two more years when the appeals were heard. However, the Board held that it would make no decision regarding the 2009 quotas because the 2009 moose hunting season was over.

Next, the Board considered whether the Regional Manager provided the Appellants with sufficient notice and consultation about the reduced quotas and allocations. The Appellants testified that they were shocked by their new quotas and allocation. They submitted that they were given very little information about the reasons for the reductions or how the numbers were calculated, and that they had insufficient notice about reductions that had a significant impact on their businesses. The Board found that the timing of the Regional Manager's advance notice of the reductions allowed little time for the Appellants to adjust their business plans for the 2009 season, and that they did not receive details about the reasons for the reductions until their appeals were heard by the Board.

However, the Board also found that the Regional Manager provided the Appellants with notice of the reductions in December 2008, and Ministry staff conducted an information session with guide outfitters and a consultant retained by the Cariboo Chilcotin Guide Outfitters Association in January 2009, before the Regional Manager issued his decisions in February 2009. The Board found that the Regional Manager could not have provided earlier notice to the Appellants, because the impacts of the new policy on the Appellants were not fully understood until November 2008, after the regional moose population estimates were completed and Ministry staff calculated the portion of the moose annual allowable hunt that would be available to non-resident hunters after allowing for higher priority purposes, such as conservation, First Nations use, and resident hunters. In those circumstances, the Board found that any inadequacies in the Regional Manager's notice and consultation were insufficient to warrant sending the decisions back to the Regional Manager. Further, the Board noted that the Regional Manager has the discretion to adjust quotas from year to year, and the parties have the opportunity to continue to consult about future quotas and allocations.

The Board next considered whether to refer the appealed decisions back to the Regional Manager with directions to: extend the period of transition to the new policy beyond 2012; revise the region's moose population estimate based on input from guide outfitters and other stakeholders; and, to consider a financial impact study as part of any review of the new policy. The Board found that the Regional Manager applied the same decision-making process to all of the Appellants, and the methodology used to estimate the moose population was scientifically sound, fair, and the best that could be achieved given the resources and time available. The Board also found that, even if the moose population estimate increased, it would not necessarily lead to an increase in the Appellants' quotas or allocations, because additional moose could be allocated to higher priority purposes such as conservation or First Nations use, rather than to non-resident hunters, who are the lowest priority. In those circumstances, the Board found that the Regional Manager's decisions were reasonable. The Board also concluded that the implementation of the new policy, and the period of transition for it, are policy decisions made by the Regional Manager or other Ministry staff, and are not matters for the Board to decide. Finally, the Board reminded the parties of several options

proposed by witnesses during the hearing to address issues that were raised by the appeals but that were not within the Board's jurisdiction.

Accordingly, the Board confirmed the Regional Manager's decisions. The appeals were dismissed, with the exception of one appeal that was withdrawn during the hearing.

Skeena Region – Moose Quotas

2010-WIL-003(a), 2010-WIL-004(a), 2010-WIL-007(a), 2010-WIL-012(a), 2010-WIL-015(a)
Ron Fitch, Robert Cork, Sonny Perkinson, Gary Blackwell and Mark Ranniger v. Regional Manager (BC Wildlife Federation and North West Guides Association, Participants)

Decision Date: February 16, 2011

Panel: David H. Searle, CM, QC

These appeals were filed by five guide outfitters who operate in specific territories within the Skeena Region. They appealed their respective annual quotas and two-year allocations for moose that had been issued by the Acting Regional Manager. Each Appellant asked the Board to reverse the Regional Manager's decision and return their moose quotas and allocations to their previous levels.

With the exception of Mr. Ranniger, who failed to appear at the hearing, each of the remaining Appellants provided evidence regarding the nature of their guiding operations, and the impacts of the Regional Manager's decision on their operations. Conversely, the Regional Manager presented evidence from the Ministry's wildlife biologist for the Skeena Region, who explained how he estimated moose populations within the guides' territories, and how he applied models and calculations to determine each guide's quota and allocation.

The Board considered the evidence in relation to each Appellant. The Board found that Mr. Fitch never came close to reaching his previous annual quota of 30 moose during the past six years, and that he had not booked more than 16 clients for moose hunts in the previous three years. The Board concluded that there was no evidence that the Regional Manager's decision to reduce Mr. Fitch's two-year moose allocation to 48 (24 annually) would cause him any hardship.

Similarly, the Board found that Mr. Cork did not come close to reaching his previous annual quota of 15 moose during the past five years. However, the Board found that allowing Mr. Cork's two-year allocation to remain at 30 (15 per year), instead of the Regional Manager's decision to reduce it to 24 (12 per year), would not adversely affect conservation objectives or resident hunters' interests, because his territory is inaccessible by road and few resident hunters seek to hunt there. For those reasons, the Board sent the matter back to the Regional Manager with directions to increase Mr. Cork's two-year allocation and annual quota.

Regarding Mr. Perkinson, the Board found that the Regional Manager's decision to reduce his two-year moose allocation to 46 (23 per year) from 29 per year would result in little hardship, given his clients' low success rates in their hunts and his failure to reach his previous quota during all but one of the past five years.

In contrast, the Board found that Mr. Blackwell's clients had high success rates in their moose hunts, and he almost always reached his previous quota of 27 moose in each of the past seven years. The Board found, therefore, that the Regional Manager's decision to reduce Mr. Blackwell's two-year allocation to 43 moose (21.5 per year) would negatively affect his business. The Board also received evidence that Mr. Lewis, another guide operating in the same area as Mr. Blackwell, does not use his moose quota. Consequently, the Board sent the matter back to the Regional Manager with directions to consider ways to address Mr. Blackwell's concerns, including the

possibility of re-allocating moose from Mr. Lewis to Mr. Blackwell.

The Board dismissed the appeals of Mr. Ranniger, Mr. Fitch, and Mr. Perkinson, and allowed the appeals of Mr. Cork and Mr. Blackwell.

Peace Region – Stone's Sheep Quota

2010-WIL-005(a) Arthur Thompson v. Regional Wildlife Manager (B.C. Wildlife Federation, Participant)

Decision Date: August 30, 2010

Panel: Gabriella Lang

This appeal highlights an issue that underlies the government's hunting allocation policy. That is, trying to balance competing demands/interests in the wildlife resource between First Nations, residents and non-residents (commercial), while also conserving the resource. For big game such as Stone's Sheep, the provincial policy provides resident hunters with a minimum of 60 percent of the available hunt, after accounting for species conservation and First Nations' interests. Resident hunters may hunt without a guide, but resident hunting of certain big game species is restricted in some areas of the province under the *Limited Entry Hunting Regulation*. However, in the Peace Region, where Mr. Thompson operates, resident hunters may hunt for Stone's Sheep under a general open season rather than under a limited entry hunt.

Mr. Thompson received an annual guide outfitter licence with a quota of 10 Stone's sheep. He asked the Board to send his licence back to the Regional Manager with directions to remove his quota and allow his clients to hunt in a general open season, or alternatively, to impose limited entry hunting on resident hunters for Stone's Sheep. In his view, it is unfair and discriminatory to allow resident hunters to hunt for Stone's Sheep in a general open season, while imposing a quota on guide outfitters when there are no conservation concerns.

The Board found that neither it nor the Regional Manager has the jurisdiction to provide the remedies sought by Mr. Thompson. The Board noted that limited entry hunting is regulated by the Minister of Environment under the *Limited Entry Hunting Regulation*. The Regional Manager has no authority to amend the Limited Entry Hunting Regulation. In addition, the Regional Manager has no discretion to change the provincial policy that gives resident hunters priority over non-resident hunters in the harvest of big game. The Regional Manager's discretion is limited to setting big game quotas for guide outfitters, who guide non-resident hunters. Further, Mr. Thompson appealed the Regional Manager's issuance of his licence and quota, and therefore, only those matters were properly before the Board in this case.

In addition, the Board found that there was no evidence that the Regional Manager treated Mr. Thompson unfairly or discriminated against him.

Accordingly, the appeal was dismissed.

Skeena Region – Moose, Mountain Goat, Mountain Sheep and Caribou Quotas

2010-WIL-006(a) Ray Collingwood v. Regional Manager (BC Wildlife Federation, North West Guides Association, and Tahltan Band Council, Participants)

Decision Date: February 16, 2011

Panel: David H. Searle, CM, QC

Ray Collingwood has operated a guiding business for many years in a 3,600 square mile territory within Spatsizi Provincial Park. He appealed the annual quotas and multi-year allocations for moose, mountain goat, mountain sheep and caribou that were issued by the Regional Manager. His two-year (2010 to 2012) allocations were: 43 moose; 7 mountain goat; 15 mountain sheep; and 38 caribou. His quotas and allocations for all of these species had been reduced from

previous years, but his main concern was the reduction in his mountain goat quota and allocation because it would have a significant financial effect on his business.

Mr. Collingwood asked the Board to return his quotas and allocations to their previous levels. Specifically, he requested the following increases to his two-year allocations: 48 moose; 12 mountain goat; 16 mountain sheep; and 40 caribou. He also requested a delay in implementing the new harvest allocation policy until 2017, an independent review of the quota reduction, and a consultation process with the Ministry that includes individual guide outfitters.

Mr. Collingwood provided evidence regarding the nature of his guiding operations, and the impacts of the Regional Manager's decision on his guiding operations. He also provided expert evidence from Dr. D.F. Hatler regarding flaws in the Ministry's models for estimating big game populations in Mr. Collingwood's guide territory. Dr. Hatler testified that, for all species of interest, the population estimates were extrapolations from other areas or outdated population surveys, and their applicability to the current situation was unsupported.

The Regional Manager submitted that the quotas and allocations should be confirmed. The Ministry's wildlife biologist for the Skeena Region explained how he estimated big game populations for the region, and applied models and calculations to determine species quotas and allocations. In response to Dr. Hatler's evidence, the wildlife biologist acknowledged that he used "soft" and "stale dated" information when estimating populations of the species of interest, and he agreed with Dr. Hatler's recommendations regarding an alternative approach that could address Mr. Collingwood's concerns while also addressing resident hunters' interests.

The Board held that it could only consider the first remedy sought by Mr. Collingwood; namely, whether the Regional Manager's decision with respect to Mr. Collingwood's quotas and allocations should be reversed. The Board found that the other remedies he sought were outside of the Board's jurisdiction.

The Board considered the evidence regarding the processes used to calculate species populations, quotas and allocations in the region. The Board held that, if science had supported the Ministry's population estimates for Mr. Collingwood's territory, the Board would have confirmed the Regional Manager's quotas and allocations. However, since the Ministry's wildlife biologist admitted that the science used to estimate species populations in the territory was "soft" and "stale dated", and that he agreed with Dr. Hatler's recommendations, the Board found that it was appropriate to vary the Regional Manager's decision by granting Mr. Collingwood's requested quotas for the 2011/2012 season, which were half of the two-year allocations he sought; specifically: 24 moose, 6 mountain goat, 8 mountain sheep, and 20 caribou. The Board decided not to vary the Regional Manager's decision in relation to the 2010/2011 because that season was almost over. The Board also recommended that the Regional Manager take certain steps, as suggested by Dr. Hatler, to better address the interests of Mr. Collingwood and resident hunters in the territory.

The appeal was allowed.

(2) Other Issues Under the *Wildlife Act*

Problem Wildlife – Application for a "kill permit" to control Elk

2010-WIL-002(a) Linda Yaciw v. Regional Manager (B.C. Wildlife Federation, Participant)

Decision Date: October 1, 2010

Panel: Loreen Williams

Ms. Yaciw operates a farm in the Peace River area of BC on which she breeds, raises and sells rare horse breeds (Cleveland Bay), as well as more common horses (Quarter Horses and Thoroughbreds). Wild elk populations have caused problems on the farm, such as breaking fences and eating her horses'

food and minerals. Ms. Yaciw has tried many methods to reduce the number of elk on her property, including changing the horses' feeding schedule and inviting hunters to hunt elk on her property, but those methods were unsuccessful and caused additional problems. Ms. Yaciw applied to the Ministry for a five-year "kill permit" that would allow her to kill elk on her farm property. The permit would allow her to protect her horses and reduce the elk population in her area. The Regional Manager denied her application, and Ms. Yaciw appealed to the Board.

Under section 19(1) of the *Wildlife Act* and section 2(b)(ii) of the *Permit Regulation*, a regional manager may issue a permit authorizing a resident to hunt, trap or kill wildlife on his or her own property during an open or closed season, for the purpose of controlling wildlife populations. The Board acknowledged that Ms. Yaciw was facing great difficulties in her horse farming operation due to the presence of elk. However, the Board found that a kill permit is an extraordinary remedy that should only be issued as a "last resort" to deal with problem wildlife. The Board held that, rather than killing elk under a permit, Ms. Yaciw could take further preventative measures such as installing elk-proof fencing around areas where feed is stored and horses are fed. The Board acknowledged that such fencing is costly and that Ms. Yaciw had explained that she could not afford it, but the Board found that fencing would provide the best protection and would reduce her losses of hay and minerals. Alternatively, if fencing was not feasible, the Board found that Ms. Yaciw was eligible to apply for a general hunting licence so that she could hunt elk on her property during the open season for elk. While this would not eliminate elk from the area, the Board held that even a kill permit would not achieve that result. For these reasons, the Board concluded that it was appropriate to deny Ms. Yaciw's application for a kill permit, and the Board confirmed the Regional Manager's decision.

The appeal was dismissed.

Trapper seeks to harvest black bears on Vancouver Island

2010-WIL-016(a) Darlene Clark v. Director, Fish and Wildlife Branch

Decision Date: September 16, 2010

Panel: Alan Andison

Darlene Clark appealed against a letter issued by the Director of Fish and Wildlife Branch, Ministry of Environment, which provided notice that there would not be a season for trappers to harvest black bears in certain regions of BC during the 2010/11 and 2011/12 hunting and trapping seasons. Ms. Clark holds a registered trapline on Vancouver Island. The Director's letter was addressed to three members of the BC Trapper's Association, including Ms. Clark. Ms. Clark submitted that the Director's "decision" discriminated against trappers, because black bears are hunted in all regions of the Province, whereas trappers can only harvest black bears in certain regions.

After receiving Ms. Clark's notice of appeal, the Board requested submissions from the parties on the question of whether the Director's letter contained an appealable decision under sections 101 and 101.1(1) of the *Wildlife Act*.

Ms. Clark submitted that the Director's letter contained an appealable decision. The Director submitted that he did not make an appealable decision, because he has no statutory authority to set trapping seasons. Rather, trapping seasons are prescribed in the *Wildlife Act Commercial Activities Regulation* (the "*Regulation*").

The Board held that schedules in the *Regulation* prescribe the open seasons for furbearing wildlife in each region of the Province. The *Regulation* is made by the Lieutenant Governor in Council (i.e. Cabinet), pursuant to section 108(3)(e) of the Act. The Board found that Cabinet, and not the Director, has the statutory authority to decide open seasons for

trapping wildlife. In this case, the Director's letter simply provided notice that no change in the *Regulation* was forthcoming in terms of the regions where there would be open seasons for trapping black bear.

In addition, the Board found that sections 101 and 101.1(1) of the *Wildlife Act* clearly indicate that only certain decisions of the Director or a regional manager may be appealed to the Board. Decisions of Cabinet are not appealable to the Board, and the Board has no authority to direct Cabinet to amend regulations. Consequently, the Board concluded that the matter appealed by Ms. Clark was not a decision that may be appealed to the Board.

Accordingly, the appeal was rejected for lack of jurisdiction.

Disabled hunter seeks regulatory amendments to hunt out of season

2010-WIL-020(a) Larry Hall v. Director of Wildlife

Decision Date: August 30, 2010

Panel: Gabriella Lang

Mr. Hall held a limited entry hunting authorization to hunt for moose with a rifle in a specific area, during specific dates. He sought a permit to hunt for moose with a rifle during the bow-only moose hunting season, which started several weeks before the season for hunting moose with a rifle. Mr. Hall sought the permit on the basis of his physical disability, which was not in dispute. The Director has discretion to issue permits, subject to the regulations, under section 19 of the *Wildlife Act*. The Director issued a letter to Mr. Hall stating that he was unable to grant his request because the Director has no statutory authority to modify the dates of the limited entry hunting season.

Mr. Hall appealed to the Board on the basis that the Director has the authority to grant his request. Mr. Hall also submitted that the Director discriminated against him because his disability prevents him from hunting with a bow, and the Director failed to accommodate him as a disabled hunter by refusing to allow him to hunt moose with a rifle during the time when bow hunters can hunt for moose.

The Board considered whether the Director had the authority to change the dates of Mr. Hall's limited entry hunting authorization. The Board found that the Director can only do what the *Wildlife Act* and regulations specifically allow him to do, and neither the *Permit Regulation* nor section 19 of the *Wildlife Act* authorize the Director to issue the type of permit Mr. Hall was seeking. Furthermore, the Board held that the Director had no authority to amend the *Limited Entry Hunting Regulation*, which sets out the dates of the open season for hunting moose with a rifle in the area where Mr. Hall wanted to hunt. The Board also held that it has no authority under section 101.1 of the *Wildlife Act* to direct the Minister to amend that regulation.

Regarding Mr. Hall's submission that the Director discriminated against him and failed to accommodate him as a disabled hunter, the Board found that there was no evidence that the Director denied Mr. Hall's request on the basis of his disability, and the Director had no authority to accommodate Mr. Hall in the way that he requested.

The appeal was dismissed.

Permit to rehabilitate injured wildlife denied

2010-WIL-021(a) Pacific Northwest Raptors, Ltd. v. Regional Manager

Decision Date: February 25, 2011

Panel: Gabriella Lang

Pacific Northwest Raptors Ltd. ("PNWR") operates a commercial raptor and falconry centre in Duncan, BC. It provides flying demonstrations, raptor breeding, falconry training, educational programs, and bird control services. PNWR also has biologists and technicians who are trained in handling injured

raptors. PNWR holds permits that authorize its commercial and educational activities.

Until 2010, PNWR also held annual permits that allowed it to temporarily possess and care for injured birds for up to two weeks, until the birds could be transferred to a designated wildlife rehabilitation centre. In the past, PNWR applied for permits that would allow it to rehabilitate injured birds, but those applications were denied based on the Ministry's policy against issuing rehabilitation permits to commercial breeding facilities. The Ministry's policy is based on concerns that it is a conflict of interest to conduct both rehabilitation and commercial breeding of birds.

In May 2010, PNWR applied to the Ministry for a rehabilitation permit. In support of the application, PNWR suggested measures to address the Ministry's concerns about a potential conflict of interest.

In August 2010, the Regional Manager denied PNWR's application for a rehabilitation permit and did not issue PNWR a permit to temporarily possess and care for injured birds. His decision was based on PNWR's noncompliance with its previous permits on several occasions, when it held injured birds longer than two weeks, and the Ministry's conflict of interest policy.

PNWR appealed this decision on several grounds, including that he fettered his discretion by placing too much weight on the Ministry policy, he failed to consider PNWR's specific circumstances, he considered irrelevant and uncorroborated allegations against PNWR, and he failed to consider all relevant information.

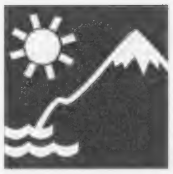
The Board considered whether the Regional Manager's decision was a reasonable exercise of discretion in the circumstances. At the hearing, PNWR admitted that it failed to meet the two-week time limit in its previous permits on many occasions, but it submitted that the time limit was inadequate and impractical, and that transporting injured birds to a designated rehabilitation centre was not necessarily in the birds' best interests. PNWR also questioned the Ministry's biological approach towards raptors.

The Board found that PNWR has provided good care to injured birds in the past, but it knowingly failed to comply with the conditions of its permits on multiple occasions. Although PNWR claimed that it kept the birds longer than it was allowed for biological and ethical reasons, the Board found that the evidence showed that it also had financial and logistical reasons for doing so. The Board also found that PNWR did not comply with the Ministry's requests to clarify the nature of its permitted operations to the public, as PNWR described itself on its website as a rehabilitation centre and sought donations on that basis. The Board held that the Regional Manager had considered PNWR's specific circumstances, and that PNWR's history of non-compliance was a relevant consideration. The Board also concluded that the Regional Manager did not place inappropriate weight on the Ministry's policy.

The Regional Manager acknowledged that he considered two letters from designated rehabilitation centres which expressed concern about PNWR, and those letters were not forwarded to PNWR for comment before he made his decision. However, the Board found that those letters were not the reason for his decision, and that the Regional Manager had sufficient reasons to refuse PNWR's application, even without those letters or the Ministry's policy.

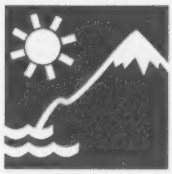
In summary, the Board concluded that the Regional Manager exercised his discretion reasonably when he denied PNWR's permit application.

The appeal was dismissed.



Summaries of Court Decisions Related to the Board

There were no court decisions issued on judicial reviews or appeals of Board decisions during this report period.



Summaries of Cabinet Decisions Related to the Board

There were no orders by Cabinet during this report period concerning decisions by the Board.

APPENDIX I

Legislation and Regulations

Reproduced below are the sections of the *Environmental Management Act* and the *Environmental Appeal Board Procedure Regulation* which establish the Board and set out its general powers and procedures.

Also included are the appeal provisions contained in each of the statutes which provide for an appeal to the Board from certain decisions of government officials: the *Environmental Management Act*, the *Greenhouse Gas Reduction (Cap and Trade) Act*, the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*, the *Integrated Pest Management Act*, the *Water Act* and the *Wildlife Act*. Some appeal provisions are also found in the regulations made under the *Greenhouse Gas Reduction (Cap and Trade) Act* and the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act*.

The legislation contained in this report is the legislation in effect at the end of the reporting period (March 31, 2011). Please note that legislation can change at any time. An updated version of the legislation may be obtained from Crown Publications.

Although not provided below, it should be noted that, in addition to decisions of government officials, Part 3 of the *Environmental Management Act* gives district directors and officers appointed by the Greater Vancouver Regional District certain decision-making powers that can then be appealed to the Board under the appeal provisions in the *Environmental Management Act* referenced below.

In addition, the *Oil and Gas Activities Act*, S.B.C. 2008, c. 36 (not reproduced) allows the Oil and Gas Commission to make certain decisions under the *Water Act* and the *Environmental Management Act*, and those decisions may be appealed in the usual way under the appeal provisions of the *Water Act* and *Environmental Management Act*, as set out below.

Environmental Management Act, SBC 2003, c. 53

Part 8 – Appeals

Division 1 – Environmental Appeal Board

Environmental Appeal Board

93 (1) The Environmental Appeal Board is continued to hear appeals that under the provisions of any enactment are to be heard by the appeal board.

(2) In relation to an appeal under another enactment, the appeal board has the powers given to it by that other enactment.

(3) The appeal board consists of the following individuals appointed by the Lieutenant Governor in Council after a merit based process:

(a) a member designated as the chair;

(b) one or more members designated as vice chairs after consultation with the chair;

(c) other members appointed after consultation with the chair.

(4) The *Administrative Tribunals Appointment and Administration Act* applies to the appeal board.

(5 and 6) Repealed 2003-47-24.]

(7) The chair may organize the appeal board into panels, each comprised of one or more members.

(8) The members of the appeal board may sit

(a) as the appeal board, or

(b) as a panel of the appeal board.

(9) If members sit as a panel of the appeal board,

(a) 2 or more panels may sit at the same time,

(b) the panel has all the jurisdiction of and may exercise and perform the powers and duties of the appeal board, and

(c) an order, decision or action of the panel is an order, decision or action of the appeal board.

(10) The Lieutenant Governor in Council, by regulation, may establish the quorum of the appeal board or a panel.

(11) For the purposes of an appeal, sections 34 (3) and (4), 48, 49 and 56 of the *Administrative Tribunals Act* apply to the appeal board.

Parties and witnesses

94 (1) In an appeal, the appeal board or panel

(a) may hear the evidence of any person, including a person the appeal board or a panel invites to appear before it, and

(b) on request of

(i) the person,

(ii) a member of the body, or

(iii) a representative of the person or body, whose decision is the subject of the appeal or review, must give that person or body full party status.

(2) A person or body, including the appellant, that has full party status in an appeal may

(a) be represented by counsel,

(b) present evidence,

(c) if there is an oral hearing, ask questions, and

(d) make submissions as to facts, law and jurisdiction.

(3) A person who gives oral evidence may be questioned by the appeal board, a panel or the parties to the appeal.

Costs and security for costs

95 (1) The appeal board may require the appellant to deposit with it an amount of money it considers sufficient to cover all or part of the anticipated costs of the respondent and the anticipated expenses of the appeal board in connection with the appeal.

(2) In addition to the powers referred to in section 93(2) but subject to the regulations, the appeal board may make orders as follows:

(a) requiring a party to pay all or part of the costs of another party in connection with the appeal, as determined by the appeal board;

(b) if the appeal board considers that the conduct of a party has been vexatious, frivolous or abusive, requiring the party to pay all or part of the expenses of the appeal board in connection with the appeal.

(3) An order under subsection (2) may include directions respecting the disposition of money deposited under subsection (1).

(4) If a person or body given full party status under subsection 94(2) is an agent or representative of the government,

(a) an order under subsection (2) may not be made for or against the person or body, and

(b) an order under subsection (2)(a) may be made for or against the government.

(5) The costs payable by the government under an order under subsection (4)(b) must be paid out of the consolidated revenue fund.

Decision of appeal board

96 If the appeal board or a panel makes an order or decision with respect to an appeal the chair must send a copy of the order or decision to the minister and to the parties.

Varying and rescinding orders of appeal board

97 The Lieutenant Governor in Council may, in the public interest, vary or rescind an order or decision of the appeal board.

Appeal board power to enter property

98 The members of the appeal board have, for the purposes of an appeal, the right to enter any property except a private residence.

Division 2 – Appeals from Decisions under this Act

Definition of "decision"

99 For the purpose of this Division, **"decision"** means

(a) making an order,

(b) imposing a requirement,

(c) exercising a power except a power of delegation,

(d) issuing, amending, renewing, suspending, refusing, cancelling or refusing to amend a permit, approval or operational certificate,

(e) including a requirement or a condition in an order, permit, approval or operational certificate,

(f) determining to impose an administrative penalty, and

(g) determining that the terms and conditions of an agreement under section 115(4) have not been performed.

Appeals to Environmental Appeal Board

100 (1) A person aggrieved by a decision of a director or a district director may appeal the decision to the appeal board in accordance with this Division.

(2) For certainty, a decision under this Act of the Lieutenant Governor in Council or the minister is not appealable to the appeal board.

Time limit for commencing appeal

101 The time limit for commencing an appeal of a decision is 30 days after notice of the decision is given.

Procedure on appeals

102 (1) An appeal under this Division

(a) must be commenced by notice of appeal in accordance with the prescribed practice, procedure and forms, and

(b) must be conducted in accordance with Division 1 of this Part and the regulations.

(2) The appeal board may conduct an appeal under this Division by way of a new hearing.

Powers of appeal board in deciding appeal

103 On an appeal under this Division, the appeal board may

(a) send the matter back to the person who made the decision, with directions,

(b) confirm, reverse or vary the decision being appealed, or

(c) make any decision that the person whose decision is appealed could have made, and that the appeal board considers appropriate in the circumstances.

Appeal does not operate as stay

104 The commencement of an appeal under this Division does not operate as a stay or suspend the operation of the decision being appealed unless the appeal board orders otherwise.

Division 3 – Regulations in Relation to Appeal Board

Regulations in relation to the appeal board

105 (1) Without limiting section 138(1), the Lieutenant Governor in Council may make regulations as follows:

(a) prescribing a tariff of fees to be paid with respect to a matter within the jurisdiction of the appeal board;

(b) prescribing practices, procedures and forms to be followed and used by the appeal board;

(c) establishing restrictions on the authority of the board under section 95(1) to (4) including, without limiting this,

(i) prescribing limits, rates and tariffs relating to amounts that may be required to be paid or deposited, and

(ii) prescribing what are to be considered costs to the government in relation to an appeal and how those are to be determined;

(d) respecting how notice of a decision under section 96 may be given.

Environmental Appeal Board Procedure Regulation,

BC Reg. 1/82

Interpretation

1 In this regulation:

"Act" means the *Environmental Management Act*;

"board" means the Environmental Appeal Board established under the Act;

"chairman" means the chairman of the board;

"minister" means the minister responsible for administering the Act under which the appeal arises;

"objector" in relation to an appeal to the board means a person who, under an express provision in another enactment, had the status of an objector in the matter from which the appeal is taken.

Application

2 This regulation applies to all appeals to the board.

Appeal practice and procedure

3 (1) Every appeal to the board shall be taken within the time allowed by the enactment that authorizes the appeal.

(2) Unless otherwise directed under the enactment that authorizes the appeal, an appellant shall give notice of the appeal by mailing a notice of appeal by registered mail to the chairman, or leaving it for him during business hours, at the address of the board.

(3) A notice of appeal shall contain the name and address of the appellant, the name of counsel or agent, if any, for the appellant, the address for service upon the appellant,

grounds for appeal, particulars relative to the appeal and a statement of the nature of the order requested.

(4) The notice of appeal shall be signed by the appellant, or on his behalf by his counsel or agent, for each action, decision or order appealed against and the notice shall be accompanied by a fee of $25, payable to the minister charged with the administration of the *Financial Administration Act*.

(5) Where a notice of appeal does not conform to subsections (3) and (4), the chairman may by mail or another method of delivery return the notice of appeal to the appellant together with written notice

(a) stating the deficiencies and requiring them to be corrected, and

(b) informing the appellant that under this section the board shall not be obliged to proceed with the appeal until a notice or amended notice of appeal, with the deficiencies corrected, is submitted to the chairman.

(6) Where a notice of appeal is returned under subsection (5) the board shall not be obliged to proceed with the appeal until the chairman receives an amended notice of appeal with the deficiencies corrected.

Procedure following receipt of notice of appeal

4 (1) On receipt of a notice of appeal, or, in a case where a notice of appeal is returned under section 3(5), on receipt of an amended notice of appeal with the deficiencies corrected, the chairman shall immediately acknowledge receipt by mailing or otherwise delivering an acknowledgement of receipt together with a copy of the notice of appeal or of the amended notice of appeal, as the case may be, to the appellant, the minister's office, the official from whose decision the appeal is taken, the applicant, if he is a person other than the appellant, and any objectors.

(2) The chairman shall within 60 days of receipt of the notice of appeal or of the amended notice of appeal, as the case may be, determine whether the appeal is to be decided by members of the board sitting as a board or by members of the board sitting as a panel of the board and the chairman shall determine whether the board or the panel, as the case may be, will decide the appeal on the basis of a full hearing or from written submissions.

(3) Where the chairman determines that the appeal is to be decided by a panel of the board, he shall, within the time limited in subsection (2), designate the panel members and,

(a) if he is on the panel, he shall be its chairman,

(b) if he is not on the panel but a vice chairman of the board is, the vice chairman shall be its chairman, or

(c) if neither the chairman nor a vice chairman of the board is on the panel, the chairman shall designate one of the panel members to be the panel chairman.

(4) Within the time limited in subsection (2) the chairman shall, where he has determined that a full hearing shall be held, set the date, time and location of the hearing of the appeal and he shall notify the appellant, the minister's office, the Minister of Healthy Living and Sport if the appeal relates to a matter under the *Health Act*, the official from whose decision the appeal is taken, the applicant, if he is a person other than the appellant, and any objectors.

(5) Repealed. [B.C. Reg. 118/87, s.2.]

Quorum

5 (1) Where the members of the board sit as a board, 3 members, one of whom must be the chairman or vice chairman, constitute a quorum.

(2) Where members of the board sit as a panel of one, 3 or 5 members, then the panel chairman constitutes a quorum for the panel of one, the panel chairman plus one other member constitutes the quorum for a panel of 3 and the panel chairman plus 2 other members constitutes the quorum for a panel of 5.

Order or decision of the board or a panel

6 Where the board or a panel makes an order or decision with respect to an appeal, written reasons shall be given for the order or decision and the chairman shall, as soon as practical, send a copy of the order or decision accompanied by the written reasons to the minister and the parties.

Written briefs

7 Where the chairman has decided that a full hearing shall be held, the chairman in an appeal before the board, or the panel chairman in an appeal before a panel, may require the parties to submit written briefs in addition to giving oral evidence.

Public hearings

8 Hearings before the board or a panel of the board shall be open to the public.

Recording the proceedings

9 (1) Where a full hearing is held, the proceedings before the board or a panel of the board shall be taken using shorthand or a recorder, by a stenographer appointed by the chairman, for a hearing before the board, or by the panel chairman, for a hearing before the panel.

(2) Before acting, a stenographer who takes the proceedings before the board or a panel shall make oath that he shall truly and faithfully report the evidence.

(3) Where proceedings are taken as provided in this section by a stenographer so sworn, then it is not necessary that the evidence be read over to, or be signed by, the witness, but it is sufficient that the transcript of the proceedings be

(a) signed by the chairman or a member of the board, in the case of a hearing before the board, or by the panel chairman or a member of the panel, in the case of a hearing before the panel, and

(b) be accompanied by an affidavit of the stenographer that the transcript is a true report of the evidence.

Transcripts

10 On application to the chairman or panel chairman, as the case may be, a transcript of the proceedings, if any, before the board or the panel of the board shall be prepared at the cost of the person requesting it or, where there is more than one applicant for the transcript, by all of the applicants on a pro rata basis.

Representation before the board

11 Parties appearing before the board or a panel of the board may represent themselves personally or be represented by counsel or agent.

Greenhouse Gas Reduction (Cap and Trade) Act, SBC 2008, c. 32

Part 7 – Appeals to Environmental Appeal Board

What decisions may be appealed, who may appeal, the process of appeal

22 (1) For the purposes of this Part, **"decision"** means any of the following:

(a) the determination of non-compliance under section 18 or of the extent of that non-compliance, as set out in an administrative penalty notice;

(b) the determination of non-compliance under section 19, of the extent of that non-compliance or of the amount of the administrative penalty, as set out in an administrative penalty notice;

(c) a prescribed decision or a decision in a prescribed class.

(2) A person who is served with

(a) an administrative penalty notice referred to in subsection (1)(a) or (b), or

(b) a document evidencing a decision referred to in subsection (1)(c).

may appeal the applicable decision to the appeal board.

(3) Subject to this Act, Division 1 of Part 8 of the *Environmental Management Act* applies in relation to appeals under this Act.

Reporting Regulation, BC Reg. 272/2009

Part 5 – Appeals to Environmental Appeal Board

32 (1) The following provisions are prescribed for the purpose of section 22 (1) (c) of the Act:

(a) section 13 (7) *[approval of alternative methodology for 2010]*;

(b) section 14 (2) *[approval of change of methodology]*.

(2) The following provisions of the *Environmental Management Act* apply in relation to appeals under the Act:

(a) section 101 *[time limit for commencing appeal]*;

(b) section 102 *[procedure on appeals]*;

(c) section 103 *[powers of appeal board in deciding appeal]*;

(d) section 104 *[appeal does not operate as stay]*.

(3) The *Environmental Appeal Board Procedure Regulation*, B.C. Reg. 1/82, is adopted in relation to appeals under the Act.

Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act, SBC 2008, c. 16

Part 5 – Appeals to Environmental Appeal Board

What decisions may be appealed, who may appeal, the process of appeal

14 (1) For the purposes of this Part, **"decision"** means any of the following:

(a) the determination of non-compliance under section 11 *[imposed administrative penalties: fuel requirements]* or of the

extent of that non-compliance, as set out in an administrative penalty notice;

(b) the determination of non-compliance under section 12 *[administrative penalties in relation to other matters]*, of the extent of that non-compliance or of the amount of the administrative penalty, as set out in an administrative penalty notice;

(c) a refusal to accept an alternative calculation of carbon intensity under section 6 (3) (b) (iii) *[requirements for reduced carbon intensity]*;

(d) a prescribed decision or a decision in a prescribed class.

(2) A person who is served with

(a) an administrative penalty notice referred to in subsection (1) (a) or (b),

(b) a refusal referred to in subsection (1) (c), or

(c) a document evidencing a decision referred to in subsection (1) (d)

may appeal the applicable decision to the appeal board.

(3) Subject to this Act, Division 1 of Part 8 *[Appeals]* of the *Environmental Management Act* applies in relation to appeals under this Act.

Renewable and Low Carbon Fuel Requirements Regulation,

BC Reg. 394/2008

Part 4 – Appeals

Time limit for commencing appeal

21 The time limit for commencing an appeal is 30 days after the notice of administrative penalty to which it relates is served.

Procedures on appeal

22 An appeal must be

(a) commenced by notice of appeal in accordance with the *Environmental Appeal Board Procedure Regulation*, and

(b) conducted in accordance with Part 5 *[Appeals to Environmental Appeal Board]* of the Act and the *Environmental Appeal Board Procedure Regulation*.

Powers of appeal board on appeal

23 (1) On an appeal, the appeal board may

(a) send the matter back to the person who made the decision with directions,

(b) confirm, reverse or vary the decision being appealed, or

(c) make any decision that the person whose decision is appealed could have made, and that the appeal board considers appropriate in the circumstances.

(2) The appeal board may conduct an appeal by way of a new hearing.

Integrated Pest Management Act,

SBC 2003, c. 58

Part 4 – Appeals to Environmental Appeal Board

14 (1) For the purposes of this section, **"decision"** means any of the following:

(a) making an order, other than an order under section 8 *[minister's orders]*;

(b) specifying terms and conditions, except terms and conditions prescribed by the administrator, in a licence, certificate or permit;

(c) amending or refusing to issue, amend or renew a licence, certificate or permit;

(d) revoking or suspending a licence, certificate, permit or confirmation;

(e) restricting the eligibility of a holder of a licence, certificate, permit or pest management plan to apply for another licence, certificate or permit or to receive confirmation;

(f) determining to impose an administrative penalty;

(g) determining that the terms and conditions of an agreement under section 23(4) *[administrative penalties]* have not been performed.

(2) A declaration, suspension or restriction under section 2 *[Act may be limited in emergency]* is not subject to appeal under this section.

(3) A person may appeal a decision under this Act to the appeal board.

(4) The time limit for commencing an appeal of a decision is 30 days after the date the decision being appealed is made.

(5) An appeal must be commenced by notice of appeal in accordance with the practice, procedure and forms prescribed by regulation under the *Environmental Management Act*.

(6) Subject to this Act, an appeal must be conducted in accordance with Division 1 *[Environmental Appeal Board]* of Part 8 of the *Environmental Management Act* and the regulations under that Part.

(7) The appeal board may conduct an appeal by way of a new hearing.

(8) On an appeal, the appeal board may

(a) send the matter back to the person who made the decision being appealed, with directions,

(b) confirm, reverse or vary the decision being appealed, or

(c) make any decision that the person whose decision is appealed could have made, and that the board considers appropriate in the circumstances.

(9) An appeal does not act as a stay or suspend the operation of the decision being appealed unless the appeal board orders otherwise.

Water Act,

RSBC 1996, c. 483

Part 6 – Appeals to Environmental Appeal Board

92 (1) Subject to subsections (2) and (3), an order of the comptroller, the regional water manager or an engineer may be appealed to the appeal board by

(a) the person who is subject to the order,

(b) an owner whose land is or is likely to be physically affected by the order, or

(c) a licensee, riparian owner or applicant for a licence who considers that their rights are or will be prejudiced by the order.

(1.1) Despite subsection (1), a licensee may not appeal an order of the comptroller or a regional water manager to cancel in whole or in part a licence and all rights under it under section 23(2)(c) or (d).

(2) An order of the comptroller, the regional water manager or an engineer under Part 5 or 6 in relation to a well, works related to a well, ground water or an aquifer may be appealed to the appeal board by

(a) the person who is subject to the order,

(b) the well owner, or

(c) the owner of the land on which the well is located.

(3) An order of the comptroller, the regional water manager or an engineer under section 81 *[drilling authorizations]* may be appealed to the appeal board by

(a) the person who is subject to the order,
(b) the well owner,
(c) the owner of the land on which the well is located, or
(d) a person in a class prescribed in respect of the water management plan or drinking water protection plan for the applicable area.

(4) The time limit for commencing an appeal is 30 days after notice of the order being appealed is given
(a) to the person subject to the order, or
(b) in accordance with the regulations.

(5) For the purposes of an appeal, if a notice under this Act is sent by registered mail to the last known address of a person, the notice is conclusively deemed to be served on the person to whom it is addressed on
(a) the 14th day after the notice was deposited with Canada Post, or
(b) the date on which the notice was actually received by the person, whether by mail or otherwise,
whichever is earlier.

(6) An appeal under this section
(a) must be commenced by notice of appeal in accordance with the practice, procedure and forms prescribed by regulation under the *Environmental Management Act*, and
(b) subject to this Act, must be conducted in accordance with the *Environmental Management Act* and the regulations under that Act.

(7) The appeal board may conduct an appeal by way of a new hearing.

(8) On an appeal, the appeal board may
(a) send the matter back to the comptroller, regional water manager or engineer, with directions,
(b) confirm, reverse or vary the order being appealed, or
(c) make any order that the person whose order is appealed could have made and that the board considers appropriate in the circumstances.

(9) An appeal does not act as a stay or suspend the operation of the order being appealed unless the appeal board orders otherwise.

Wildlife Act, RSBC 1996, c. 488

Part 1 – General Provisions

Reasons for and notice of decisions

101 (1) The regional manager or the director, as applicable, must give written reasons for a decision that affects
(a) a licence, permit, registration of a trapline or guiding territory certificate held by a person, or
(b) an application by a person for anything referred to in paragraph (a).

(2) Notice of a decision referred to in subsection (1) must be given to the affected person.

(3) Notice required by subsection (2) may be by registered mail sent to the last known address of the person, in which case, the notice is conclusively deemed to be served on the person to whom it is addressed on
(a) the 14th day after the notice was deposited with Canada Post, or
(b) the date on which the notice was actually received by the person, whether by mail or otherwise,
whichever is earlier.

(4) For the purposes of applying this section to a decision that affects a guiding territory certificate, if notice of a decision referred

to in subsection (1) is given in accordance with this section to the agent identified in the guiding territory certificate, the notice is deemed to have been given to the holders of the guiding territory certificate as if the agent were an affected person.

Appeals to Environmental Appeal Board

101.1 (1) The affected person referred to in section 101(2) may appeal the decision to the Environmental Appeal Board continued under the *Environmental Management Act*.

(2) The time limit for commencing an appeal is 30 days after notice is given

(a) to the affected person under section 101(2), or

(b) in accordance with the regulations.

(3) An appeal under this section

(a) must be commenced by notice of appeal in accordance with the practice, procedure and forms prescribed by regulation under the *Environmental Management Act*, and

(b) subject to this Act, must be conducted in accordance with the *Environmental Management Act* and the regulations under that Act.

(4) The appeal board may conduct an appeal by way of a new hearing.

(5) On an appeal, the appeal board may

(a) send the matter back to the regional manager or director, with directions,

(b) confirm, reverse or vary the decision being appealed, or

(c) make any decision that the person whose decision is appealed could have made, and that the board considers appropriate in the circumstances.

(6) An appeal taken under this Act does not operate as a stay or suspend the operation of the decision being appealed unless the appeal board orders otherwise.

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